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ABSTRACT

In this journal are collected articles on school desegregation in 1971. J. Stanley Pottinger, Head of HEW's Title VI compliance section, offers the government's position in an essay entitled, "HEW Enforcement of Swann." On the other hand, Cynthia Brown, attorney at the Washington Research Project, takes a more skeptical view of Nixon's policy towards desegregation. The abuses within "integrated schools" in Mississippi are examined by Rims Barber in "Swann Song From the Delta". Other articles are "Segregation, Northern Style" by Paul R. Dimond; "The Sociology of Multiracial Schools" by Robert L. Green, and others; and, "Chicano Education: In Swann's Way?" by Alan Exelrod. (Author/JW)

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INEQUALITY IN EDUCATION

Number Nine

Center for Law and Education
Harvard University

School Desegregation 1971

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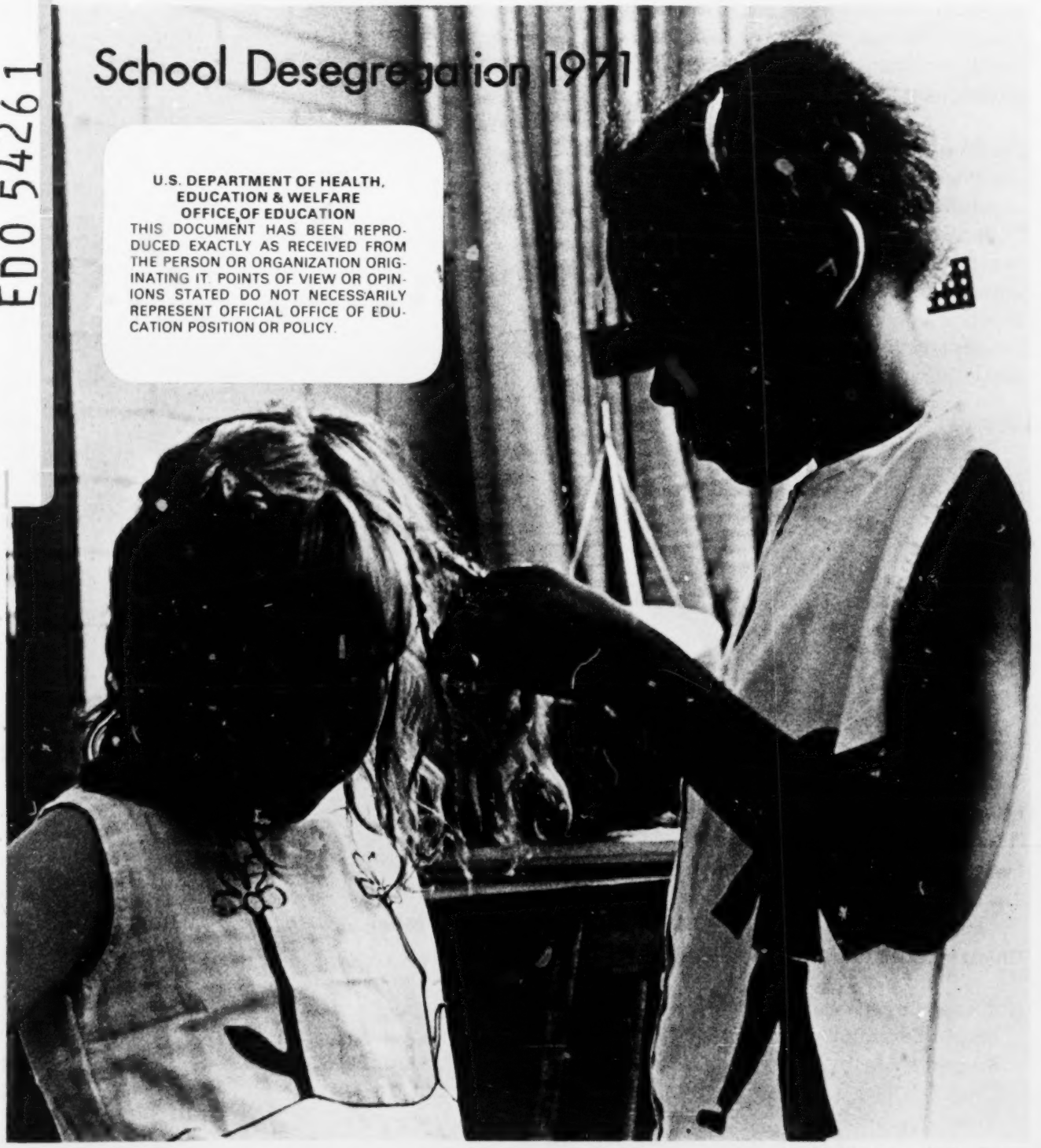

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Director: David L. Kirp

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Harvard Law School

Professor David Cohen
Harvard Graduate School of Education

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Introduction: School Desegregation 1971

A casual newspaper reader might think that, 17 years after the landmark *Brown* decision, the Supreme Court had in *Swann* finally laid to rest all questions concerning the obligation to desegregate public schools. In upholding a plan which ordered extensive busing in one large Southern metropolitan school district while overturning as inadequate a more limited integration proposal, the Supreme Court seemed determined to do what it has long proposed – to eliminate racially separate schools "root and branch." The Court's tart disposition of the claimed right to neighborhood schools, and its approval of busing and non-contiguous school attendance zones as a means of promoting integration give some force to the notion that the battle over race and schools has ended.

For a number of quite different reasons, that optimistic conculsion is unfounded. The problems that persist, while less dramatic than outright refusal to comply with the law of the land, are no less important. This issue of *Inequality In Education* draws together those problems in discussions by lawyers and laymen in the field, people who know the problems first-hand.

The post-*Brown* history suggests that Court opinions remain noble statements of principle if they are not vigorously enforced, by both government and private litigants. President Nixon's recent statement on school integration, and the suit filed in Austin, Texas, indicate that the government intends in some fashion to carry out the *Swann* mandate. Yet the government's position in recent years, most notably its foot-dragging stance in *Alexander v. Holmes County* (unanimously reversed by the Supreme Court), give legitimate cause to wonder how vigorous the government will be in pressing for desegregation. J. Stanley Pottinger, head of HEW's Title VI compliance section, offers the government's position; Cynthia Brown, attorney at the Washington Research Project, takes a more skeptical view.

Yet even if school district integration is in fact accomplished, a new set of problems more difficult to address has clearly begun to emerge. As Southern school districts become increasingly integrated – as the number of black children attending racially mixed schools grows – black students are isolated within schools. So-called "ability grouping" assigns black students to the lowest tracks; school disciplinary codes are applied with particular harshness to black children; obviously antagonistic symbols such as the Confederate flag fly over the schoolhouse. Further, black teachers and administrators who had for many years worked in all-black schools find themselves demoted or fired as school districts integrate. The lame official excuse: they're not good enough to teach (white) children. Rims Barber discusses these practices in Mississippi. One can only wonder with Barber if the story will be very different for the children of those just now entering school.

As Paul Dimond's piece indicates, segregation is hardly a phenomenon confined to the South; indeed, recent data show that while schools in the South have become more integrated during the past decade, Northern school districts are more racially identifiable than ever before. The flight of whites to the suburbs is one significant cause of this increase in Northern segregation; official practices by school officials in most cities are another – and legally attackable – cause. School district boundary-drawing; optional zones; teacher assignment; student transfer provisions; school construction; all these techniques have been employed by schoolmen to preserve the racial character of urban schools. Further, housing policies – including those of the Federal Housing Administration – have locked poor black families into the center city, aggravating racial problems. It makes little sense to describe this pattern as adventitious (*de facto*) and thus beyond judicial purview. By intent and, more importantly, by effect, such segregation is *de jure,* and warrants correction. Successful litigation in such cities as Denver, San Francisco, Los Angeles, and Pontiac suggests that judicial relief may be forthcoming; that within the next decade nominal integration may be a fact of life in the North as well as the South.

Hopefully, courts and schoolmen will learn from Southern history that nominal integration – putting black children and white children in the

same schools — is but the beginning of the educational effort. *How* integration is carried out — whether black and white children are treated as "citizens," as *Tinker* puts it, or simply as human beings with a sense of themselves and their own history — is really the critical racial policy issue of the decade. The article by Robert Green and his associates at Michigan State University analyzes these questions by reviewing the social science research on the effects of interracial education. Alan Exelrod, attorney to the Mexican American Legal Defense and Education Fund, reviews the particular needs of the Chicano community; his comments are readily extendable to other minority groups whose native language and experience is not that of melting pot America.

By and large, the articles are sobering. They serve to remind all of us that integration is not a talismanic phrase, but an infinitely complicated and important social goal. They also suggest that humane and integrated schools — and, necessarily, an integrated society — are unlikely to exist next year, or even 10 years from now.

David L. Kirp

Swann Song From the Delta

by Rims Barber

A year ago Jerris Leonard, head of the Justice Department's Civil Rights Division, predicted that "for all practical purposes the dual school system as it has existed in the South will be eliminated by September 7th [1970]." Again this year, the *Swann* decision holds out hope of final resolution of this issue. The nagging question in the minds of Mississippians concerned with school desegregation is what next year's sayings about the end being in sight will be.

In the Summer of 1971, we are standing in the trough of a calm. We have heard the high court pronounce *Swann*, and know that 18 or 20 of Mississippi's 150 school districts will have to change by the opening of school. We know that the Justice Department has prepared motions on a dozen districts, that HEW has written comprehensive reports on another half dozen, and that the courts are preparing to issue orders on three or four more. But the school boards go about their seemingly normal preparatory duties of fixing up the schools and hiring teachers.

The calm is an anxious one. The white establishment is uneasy, awaiting what it sees as the coming next blow. Defensive and toughened by years of rearguard action, the Establishment is still prepared to fight for its institutions. The black community is anxious, hoping for the real change that never comes, wondering when the wave that finally and inalterably changes the schools will hit. Many have lost hope in the long struggle. For them, changes in the schools have meant a tougher system, not better schools for their children.

Rims Barber is a member of the staff of the Delta Ministry, an agency of the National Council of Churches of Christ.

The New Discrimination

The past year proved Mr. Leonard right in one respect: The dual school system — as it had existed — was eliminated. But the legacy is a *new* discriminatory system, hardly a year old, which includes the following facts:

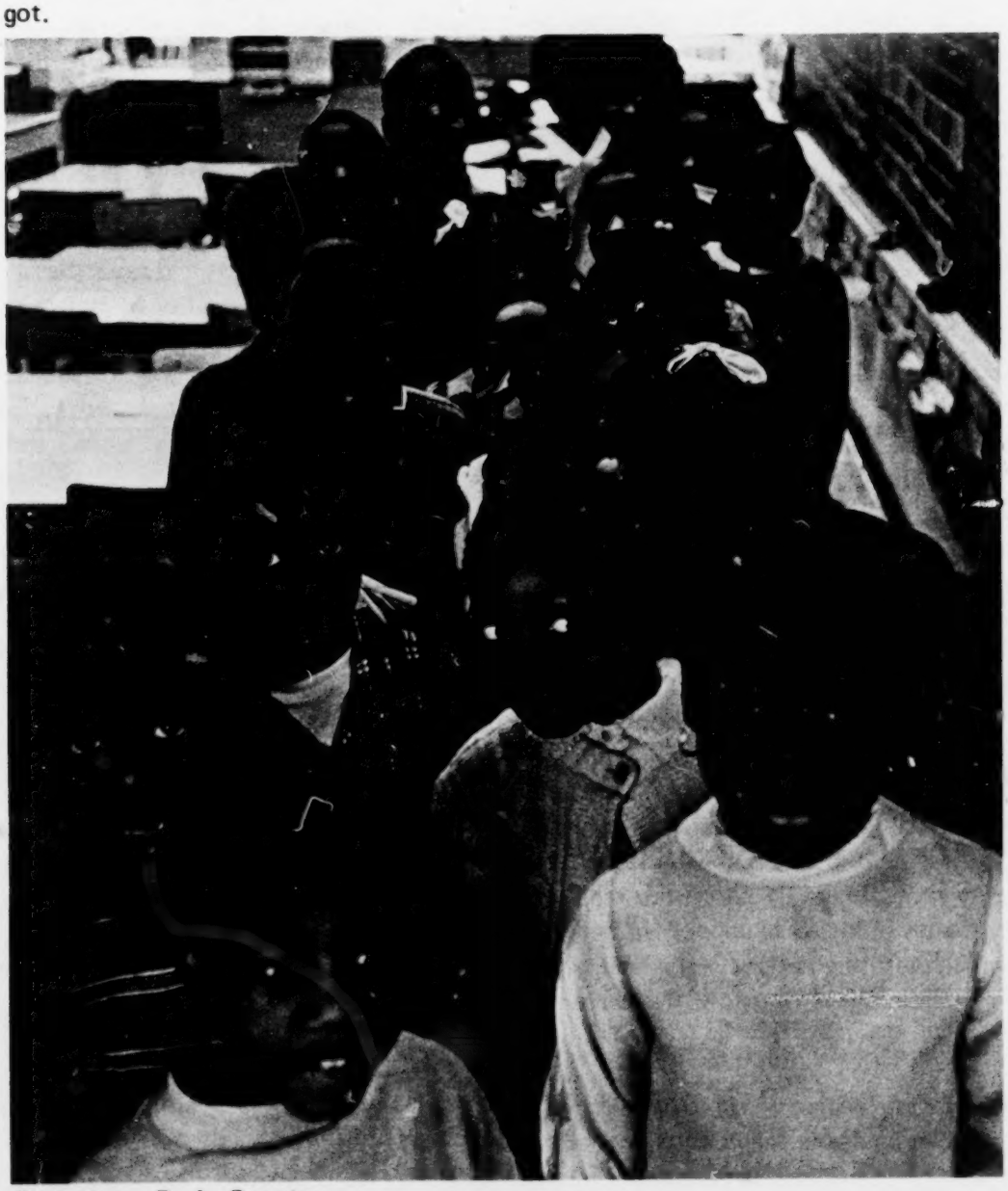
- Visible control of the schools is still white; during the past two years, more than half of all black administrators were fired, demoted, or placed in tangential positions.
- Non-tenured teachers were released for a variety of reasons. The State Department of Education reports a 5% decrease in black teachers, while independent surveys show the number to be 10 - 12%. With changes in the law for state reimbursement of teacher units, the State Department predicts a 5½% loss of regular teachers (over 1,000 teachers) in the coming year with a disproportionate number in majority black districts.
- Inside the schools are new policemen, new rules, and a new kind of documentation for minor disciplinary incidents. As a result, hundreds of black children have been expelled or suspended, all with the knowledge that their folder, containing details of each time they chewed gum or were late to a class, is waiting to be used.

■Over forty percent of black school children attend segregated classes and, cordoned off by the whites, felt the impact of separate tracking.

■Teacher recruitment from Mississippi colleges also changed. Black colleges placed 38% fewer certified graduates last year according to State Department figures, while white colleges increased placement 52%. These changing patterns make the future less hopeful for young would-be black teachers and the institutions to which they have gone for their higher education.

■The federal government appears to approve of this grim picture. It granted more than $5,000,000 to Mississippi's schools in Emergency School Assistance funds; this in addition to the normal $35 - $40,000,000 in Title I ESEA funds. Despite great numbers of complaints, no district lost any money. Everybody was eligible and everybody got.

With this legacy, the year ahead can only be looked at with concern. We must ask how long it will be before we see a wholly new system where all participate equally in the education of the community. Perhaps it will only come when this year's grandchild is old enough to be Superintendent of Education and this generation's problems have died of old age. We must also ask how new patterns of discrimination will affect those living under them. What will be the effect of a generation of discrimination in faculty hiring and assignment that lessens the chance of a black child ever having a black teacher? What will it mean to be placed in a lower track for a whole career? Will the legalism of the struggle finally bind us all? Will there be a year when we know we are on the high road to quality change? This year? No. Is there hope for 1972?



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HEW Enforcement of **Swann**

by J. Stanley Pottinger

The Supreme Court's *Swann* decision, read in light of the specific conditions in Charlotte, North Carolina, is a relatively clear pronouncement. Attempting a general assessment of the meaning and applicability of the *Swann* decision to former *de jure* school systems, however, is another matter. The vast differences which exist among Southern school districts today defy formulation of a single definition of the desegregation problem or an approach to it. Reconciling the need for uniformity and clarity of legal standards with the equally important need for flexibility to take account of vastly different situations is a constant struggle, and one which in the end probably can never be fully or neatly resolved. In order to understand how the Court's decision is to be translated into practical results, it is necessary first to have in mind the differing characteristics of former dual systems, what has happened to them in the last few years, and the kinds of remaining problems to which *Swann* may apply.

Although there is tendency to refer to "the South" as if it were a single entity of school districts of equal sizes, shapes and rates of progress, it is as divergent and complex in its makeup as any other part of the country. Some districts, like Charlotte-Mecklenburg, are urban centers having relatively large racially-homogeneous residential patterns too broad to enable school children to walk to integrated schools. Atlanta, Memphis, Miami, Birmingham, Dallas, Richmond and Mobile are other examples. Other school districts are of medium geographic size, having a combination of urban and rural patterns, where some children attend schools near their homes and others are bused for miles. Still other school systems are predominantly rural, where 90 percent or more of the children are transported to school and always have been. School populations vary similarly, ranging from cities like Houston, Texas, with almost a quarter of a million school children, to school districts having less than 300 children.

Superimposed on these wide ranges in geographical and population differences is an equally wide range of racial composition. Contrast the small, rural district of Claiborne, Mississippi (86 percent Negro children) and the Washington D.C. system (95 percent Negro children) with Pickens County, South Carolina (about 12 percent black) and Nashville, Tennessee (about one-quarter Negro enrollment). The range between all-black and all-white systems is virtually unlimited, making it impossible to say, for instance, that *Swann* requires a general rule that there be no more majority black schools.

Other factors which the Supreme Court found relevant in defining a school district's constitutional duty also vary from one district to the next. School sizes and capacities are considerably different. The quality of facilities varies, with some in excellent condition (a number of black schools were built after the *Brown* decree with the mistaken hope that this would forestall integration), and others, both black and white, in deplorable shape.

Perhaps the most complicating factor of all, however, stems from the progress that has been made in school desegregation over the last couple of years. Between 1954 and 1968 it was relatively easy to identify dual systems since there had been little actual desegregation, and the duality of the schools remained largely intact. (That is not to say, of course, that there was little federal and private civil rights agency activity during this time. The historic effort to achieve freedom of choice for black children; the failure of that policy once it had been achieved; and the continuing pressure for assuring the actual desegregation of schools are well known).

Desegregation Progress

That there has been substantial change in the racial composition of individual schools in the South during the last two years is a matter of record, although still too dimly perceived by the

Stanley Pottinger is director of the HEW Office for Civil Rights, responsible for minority racial compliance in all HEW-funded programs.

public generally. When school opened in the fall of 1968, only 18 percent of the 2.9 million Negro children in the 11 Southern states attended schools which were predominantly white in their student enrollments. In the fall of 1970, that figure had more than doubled to 39 percent. Over the same time period, the percentage of Negro children attending 100 percent black schools dropped dramatically from 68 percent to 14 percent. In 1968, almost no districts composed of majority Negro (and other minority) children were the subject of federal enforcement action. It was thought up to that time, and perhaps rightly, that the limited resources of the government ought to be focused primarily on the districts which had a majority of white pupils, where the greatest educational gains might be made, and where actual desegregation was not as likely to induce white pupils to flee the system, leaving a virtually all-black system behind. Nevertheless, this decision to reserve enforcement in these districts was a mixed blessing, inasmuch as almost 40 percent of all the Negro children in the South live in systems where blacks are in the majority. Obviously, the greater the amount of desegregation in majority black districts, the fewer will be the number of black children attending mostly white schools. Ironically, the better the results in such districts, the fewer the number of minority children who will be counted as "desegregated" under a standard which measures only those minority children who attend majority white schools.

In order to account for this recent anomaly, HEW has begun to extract from its figures the number of minority children who live in mostly white districts and who attend mostly white schools. Last year, approximately 54 percent of the Negro children in the South who live in such districts attended majority white schools. Conversely, nearly 40 percent of the 2.3 million white children who live in mostly black (or minority) districts now attend mostly black (or minority) schools.

These changes do not stand alone, of course, but are a reflection of changes that have taken place generally in race relations in the South. In voting rights, in public accommodations, as well as in schools and other areas of life, progress has come only recently, but it has been substantial. Indeed, the recent census studies showing a sharp decline in the northward migration of Southern minorities can be attributed in part to a change in attitudes, behavior, and conditions. James Meredith's recent departure from New York for Mississippi, to live in what he terms a more hospitable environment for Negroes, probably should not be considered an aberration.

The purpose of recounting these advances in race relations and school desegregation in the South is not to contradict the need for further vigorous civil rights enforcement, nor is it to offer up gratuitous commendations. It is merely to point out that conditions have been altered substantially enough to complicate significantly the tasks of identifying the remaining problems and devising appropriate remedies.

District-by-District Approach

When this general progress is examined on a district-by-district basis, as it must be for compliance purposes, the region's varying degrees of progress become obvious. In many districts, the dual system has been fully disestablished, and the communities have moved beyond dealing with *Swann*-type problems to dealing constructively with the kinds of educational problems that exist within any integrated school district, North or South. In other school districts, while most of the schools may be integrated, one or more may still retain racially-identifiable vestiges of the former dual system. And in a few districts, including the urban districts to which *Swann* is primarily addressed, although some desegregation has occurred, additional movement clearly must be made to eliminate substantial remnants of former total segregation.

In the first instance, it seems clear that *Swann* does not change the overall objective of the school desegregation effort--that is, the elimination of the dual system of schools based on race. In *Brown v. Board of Education* the Court stated the principle implicitly in its holding that "in the field of public education the doctrine of 'separate but equal' has no place." In *Green v. County School District*, the Court stated the objective by holding that former *de jure* systems have an obligation to operate "not black schools, and not white schools, but just schools." And in *Swann* the Court says that, "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." [Slip op. p. 10].

Of course, these generalizations leave many practical questions unanswered. What is a "black school" or a "racially-identifiable school," and how does one go about identifying one? If a

school is racially-identifiable, what is the appropriate remedy? These and a host of related questions must be answered in light of *Swann* on a case-by-case basis.

Defining Racially-Identifiable Schools

With regard to how one identifies a racially-identifiable school, the Supreme Court in *Swann* has provided additional guidance consistent with its previous rulings. Traditionally, the focus of the school desegregation effort has been on pupil assignment policies. Nevertheless, the Court clearly indicates that all aspects of a school system must to be taken into consideration.

> In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities were among the most important indicia of a segregation system. 391 U. S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by the racial composition of teachers and staff, the quality of buildings and equipment, or the organization of sports activities, a *prima facie* case of [a] violation . . . is shown. [*Swann*, slip op., p. 14].

Our first administrative step has been to make a comprehensive analysis of all districts in the 17 Southern and border states in order to identify those districts that appear potentially subject to *Swann* relief. Since pupil assignment is the primary area of concern, we have sought to analyze districts' pupil enrollment status through a review of the information they have provided us in the National School Survey.

Having this information in a data bank, we have compiled a computer print-out revealing the names and locations of all Southern school districts having one or more schools composed mostly of local minority students.* More than 3600 Southern school districts today do not have any schools mostly black in pupil composition (or mostly white in a district composed mostly of blacks). Of the districts surveyed, about 650 were found to have one or more schools of this kind (of which only 219 were found to have had one or more schools between 90 and 100 percent local minority). Of these 650 districts about 350 were found already to be under court order or in litigation, leaving about 300 appropriately subject to further review and potential enforcement action by HEW.

Our next step has been to look at the raw data in these 300 HEW districts in order to determine, as best we can, which ones appear to be required to take additional steps in light of the *Swann* decision. A school system which is 45 percent black, and which has only one majority black school which is 52 percent black, would be eliminated from the group subject to potential enforcement. (This assumes that no other compliance problems, such as a failure to desegregate faculty, discriminatory treatment of teachers, etc., appear in the file.) Of the initial 300 districts, about 75 were eliminated on this basis alone at first review, leaving the balance for further analysis.

In making a further analysis, the task has been more complex. Some districts, of course, show a pattern of racial identifiability clearly indicating the vestiges of the former dual system. In such cases, the need for enforcement action is clear, and steps to this end are currently underway.

The vast majority of non-court involved districts, however, have only one or a few schools racially identifiable, with most of the schools in the system already desegregated. In almost all of these cases, the student enrollment information itself cannot tell the story. Hence, it becomes even more important to look at other pupil assignment factors, and other non-student factors, in order to determine whether the school is still a vestige of the dual system and capable of being desegregated further in line with *Swann*. Is the school which appears, in the words of *Swann*, to be "substantially disproportionate" in its composition a former black school? Has it always been a black school? If not, why has it become one?

* "Local minority students" means those students who constitute less than half of the student population of the district, regardless of their race. Hence, in a majority black district, "local minority students" will be white-Anglo students. The term "minority student" without the designation "local" refers to a student who is other than white-Anglo--i.e., Negro, Spanish-surnamed, Oriental, or American Indian.

Eliminating Racially-Identifiable Schools

The next series of questions relates to what can be done to eliminate the racial identifiability of the schools. Is the school presently not fully desegregated because remedies were impossible in the past, and if so, in light of *Swann*, are new remedies applicable or still impossible? Is the school located geographically in a position where it cannot be paired with other schools in the system? Is it a sound facility? What capacity problems, transportation problems, or other problems are there, and are they substantial enough to deter a further remedy? If the pupil composition is not clearly racially-identifiable, but only marginally so, what other considerations are to be identified and brought to bear on a decision as to whether the school is still part of a dual system? Is the school a "second-class" school of a kind found when the dual system operated, or is it a full and equally participating member of the school community at large?

It is the gathering and analysis of information bearing on these questions which have engaged our efforts to a large extent during the summer months. In order to assist us in this effort we have sent approximately 65 letters to districts informing them that on the basis of the information on hand, it would appear that the *Swann* decision does or may apply. In some cases the district's reply will permit a prompt determination of the issues, either indicating that the dual system has been disestablished, or that further steps are clearly required. In other cases the letter is only the beginning of further inquiry. In the cases where final analysis establishes a violation, the districts are required to submit a remedial desegregation plan, or become the target for enforcement proceedings.

As for the timing of our enforcement efforts, *Alexander v. Holmes County* and the *Swann* decision require that where remedial steps are required, they must be taken immediately. As a practical matter, this translates to a deadline of the opening of school this fall. We are therefore working to analyze files, notify districts, negotiate for voluntary relief and compel compliance within this time period. We believe that it can be accomplished by Fall in most, if not all, of the districts required to take desegregation steps under *Swann*.

Although the Court leaves the definition of the goal of desegregation still in general terms--i.e. the dismantling of the dual system, the elimination of racially identifiable vestiges of state imposed segregation, or the achievement of the "greatest possible degree of actual desegregation"--the Court deals in more specific terms with methods to reach that goal. While court-order and administratively-enforced desegregation generally did not make use of non-contiguous zoning or the additional transportation typically resulting from it, the Court in *Swann* has now held that these are legitimate tools, and that these devices, as well as rezoning or gerrymandering, contiguous pairings, and the effective use of existing transportation, must be used if necessary to disestablish the dual system.

Having significantly added to a school district's tool box for implementing desegregation steps, the Court has also made clear that these tools need to be used within the limits of practicability. It then leaves to school officials, the executive branch and the lower courts the task of determining what is "practicable" in any particular case. The Court makes clear, for instance, that some all-black or virtually all-black schools, even where they are identified as the vestiges of the dual system, may continue to exist by virtue of the practical limits to be placed on non-contiguous zoning and additional transportation.

> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities . . . will . . . necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden

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> of showing that such school assignments are genuinely nondiscriminatory. [*Swann*, slip op. p. 22].

Since no *per se* rule can be drawn where virtually one-race schools are proposed, what constitutes enough to satisfy the school authority's burden of showing that such schools are permissible? Having indicated on the one hand that remedies may be "administratively awkward," the Court immediately thereafter states that, "No fixed or even substantially fixed guidelines can be established as to how far a Court can go, but it must be recognized that there are limits." [*Swann*, slip op. p. 24]. Specifically, with regard to transportation, the Court also declines to be more specific than to note that transportation has been "an integral part of the public education system for years." The Court states specifically that, "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." [*Swann*, slip op. p. 25]. The Court is a little more specific, (although not much) in noting that

> an objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what [has been] said . . . above. It hardly needs stating that the limits on the time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets . . . [*Swann*, slip op. pp. 26-27].

Despite the clear thrust of the *Swann* decision, we are still left with the need to exercise discretion in defining what limitations on noncontiguous zoning and new busing are appropriate, and what in general constitutes "impracticalities" within the meaning of the Court's qualifying phrase in the *Davis* opinion. Of course, this discretion is not without bounds defined by experience. Ultimately, giving meaning to this standard requires looking at the specific facts in the district and judging its compliance obligations by what can actually be achieved, not by intentions. Transportation is a traditional and legitimate tool, and should not be regarded as otherwise simply as a method of avoiding the constitutional duty to eliminate racially-identifiable schools. At the same time, transportation can, as the Court noted, be taken to an excess, to the point where the children transported, regardless of race, are unable to appreciate or function well in the schools to which they are assigned. Reconciling these competing interests must of necessity involve a case-by-case analysis of what can and must be done.

Local Bi-racial Cooperation

Experience clearly indicates that this reconciliation is greatly aided when a biracial committee or other mechanism for bringing the communities together is in operation. When the design of a desegregation plan is influenced by honest bi-racial participation, its chances of working in fact, as well as on paper, are immeasurably improved. Only a few weeks ago in Jackson, Mississippi, with drama unnoticed outside that city, the black community (represented largely by the NAACP, Inc. Fund) and the white community (represented largely by the school board) were able to develop a desegregation plan of their own making and design. As a result, one can hope with at least some justification that when school opens this fall the plan will actually work. Similar kinds of community involvement appear to have had a legitimate impact on the plans recently agreed upon in Mobile, Alabama; Nashville, Tennessee; and other large districts in the South.

Implementation of the *Swann* decision may represent the last chapter in the historic effort to transform the dual school structures of the South into unitary systems. The need for consistent Federal presence continues, and will be provided until the task is complete. With the results that have already been achieved, and the constitutional mandate to culminate the process now clearer, the white and minority communities of the South can look forward to the day when the dual system and all its vestiges will be behind us, and the educational needs of children can be served without regard to race, color, or national origin.

Nixon Administration Desegregation

by Cynthia Brown

The Supreme Court's landmark school desegregation decisions in *Swann v. Charlotte-Mecklenburg Board of Education* and companion cases,[1] appear to be viewed by the Nixon Administration as a way out, once and for all, of the political controversy over dismantling the dual school structure in the South. This is not to say, even with firm enforcement of the *Swann* standards, that the issue of federal responsibility in providing equal educational opportunity will have been resolved in the South (any more than it has in the North), but the battleground is shifting. New struggles are emerging such as establishment of private segregation academies, discrimination in faculty and staff dismissals, in-school segregation of students, and inequities in school finance. In the meantime, this article focuses on the Nixon Administration's likely implementation of *Swann*.

On April 20, 1971, the Supreme Court ruled that there is a "presumption against schools that are substantially disproportionate in their racial composition"; that the neighborhood school policy is no longer sacrosant; that segregatory school systems must be undone even by arrangements which are "administratively awkward, inconvenient and even bizarre"; and that busing is an acceptable desegregation tool. This ruling should have laid to rest the Nixon Administration's major augments, based upon its political priorities, with respect to school desegregation.

Apparently, few in the Nixon Administration expected the *Swann* decision. More than two years of political oratory had strongly implied that school desegregation standards would be weakened in the South. Bureaucratic in-fighting involving HEW, the Department of Justice, and the White House had resulted in at least a standstill, if not a significant desegregation retreat.[2] The Administration had sustained some stinging setbacks in the courts – particularly the *Alexander* decision ordering an end to segregation "now" and requiring the desegregation of most southern districts by the fall of 1970. As a result, the Administration seemed to feel that the basic issue of segregated student assignment had been resolved. It was felt that the job was completed, especially in rural areas and medium-sized cities, and that problems accompanying physical desegregation – so-called "second generation" problems – would be worked out with minimum federal effort and low visibility.[3] The Administration apparently felt that, at worst, the Supreme Court would rule that the plans in question – the Mobile neighborhood school plan and the Charlotte racial balance plan – were both acceptable on the ground that each got a fair hearing. With two conflicting plans upheld, no matter what the accompanying language, there would be great room for administrative interpretation and no need to reopen many cases. If this was the Administration's expectation, it must have been disappointed.

The Administration's initial reaction to the *Swann* decision was terse. Ronald L. Ziegler, White House Press Secretary announced the day after the decision that

> The Supreme Court has acted and the decision is now the law of the land and it is up to the people to obey it. It is up to local school districts and courts to carry out the court decision. The Departments of Justice and HEW will carry out their statutory responsibilities.

The Administration's position was somewhat clouded a day later by HEW Secretary Elliot Richardson in a speech to an NAACP Legal Defense Fund dinner in New York City. The Secretary seemed to be falling back on the ambiguous rhetoric which had characterized the Administration:

Cynthia Brown is an attorney working at the Washington Research Project.

> The awareness of the indispensable part played by individual understanding and mutual trust is at the heart of Administration policies in the field of civil rights. We are committed to the full enforcement of the requirements of the law. But we are convinced that these requirements can now be fulfilled more effectively by cooperation than by coercion, by persuasion than by force.

Cooperation and Local Responsibility

Word emanated from the White House that two general principles for dealing with the decision had been adopted: cooperation, not coercion, as Secretary Richardson had said, would be the approach; and the burden of new desegregation requirements would be borne mainly by southerners, not the Federal Government. There were reports that the Cabinet Committee on Education[4] and seven State Advisory Committees on Public Education (formed last summer in Alabama, Arkansas, Georgia, Louisiana, Mississippi and North and South Carolina) would be reactivated to aid in the local effort. These were alarming signals to those concerned with bringing about total school integration. Politically motivated handholding of local officials would be one thing, but to ignore completely a clear Supreme Court mandate and turn a well-established federal responsibility over to state and local governments would be outrageous and totally unacceptable.

Further clues regarding the Administration's response to the decision were not forthcoming. This was discouraging; if meaningful action were to be required, it would have to be initiated soon because of the time required for major reorganization of large urban school systems. Then on May 13, 1971, syndicated columnists, Rowland Evans and Robert Novak reported that a major struggle was going on between HEW and the Department of Justice over implementation of *Swann*. Attorney General John Mitchell was pushing a "go slow" approach, they reported, while HEW officials were urging vigorous action. Forces in the White House were said to be equally divided. Subsequent reports raised questions about the accuracy of the Evans and Novak interpretation of federal intentions. It is now widely speculated that the Evans and Novak article was planted by the Administration to cover positive federal action.

The Austin Plan*

The Administration was forced to respond one way or the other to the *Swann* decision on May 14, 1971. The Department of Justice had been ordered by a federal district judge to submit a final desegregation plan for Austin, Texas on that date. The Austin case had involved the HEW Title VI and Title IV offices and the Justice Department for several years. After prolonged but unsuccessful negotiations over plans proposed by HEW and the Austin School Board, HEW had initiated Title VI enforcement proceedings against Austin. An administrative hearing had been held January 20, 1970, and the hearing examiner ruled in HEW's favor on August 7, 1970. But Austin school officials would not budge, and with the Fall 1970 deadline for the completion of Southwide desegregation fast approaching, the Department of Justice filed suit against the district.

Austin was not a simple case. Strictly segregated housing patterns for blacks and Mexican-Americans made meaningful school desegregation impossible without substantial busing. The judge did not order a final plan to be implemented in September 1970, but instead ordered an interim plan for September and called for final plans for the following September to be submitted later. The Department of Justice did not appeal this two-part ruling because it apparently had not developed thoroughly the portion of the case dealing with Mexican-American students. Further delays by the judge and the Justice Department caused May 14, 1971 to be set as the final date for

* As this article went to press July 19, 1971, Federal District Judge Jack Roberts rejected the HEW desegregation plan for Austin elementary and junior high schools, and adopted instead the local school district's plan which would establish fine arts, social science, avocation and science centers to which pupils of all races would be bused.

The Junior high plan also reassigns all black pupils to schools "that are not identifiable as Negro schools." The senior high plan, agreed to by both HEW and the local district, would close a predominantly black school this year and reassign the black pupils to schools not identifiably black. Judge Roberts rejected the Government's request to give every school the same racial and ethnic mix as the city at large (65% Anglo, 20% Chicano, 15% black). [New York Times, July 20, 1971, p. 17].

The question remains whether the Justice Department will appeal this decision.

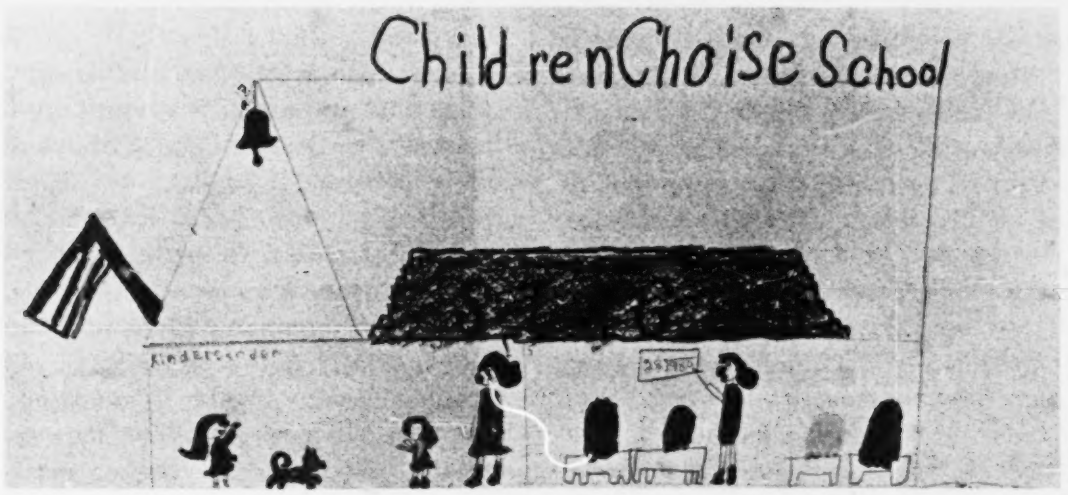

Photo by: Ben Lifson

both the school board's and Federal Government's submission of plans.[5]

The HEW desegregation plan for Austin embraces the most positive principles of the *Swann* decision. It does not racially balance every school, as did Dr. John Finger's plan for Charlotte, North Carolina, but it does use several non-contiguous zones and requires extensive new busing necessitating the purchase of perhaps as many as 100 buses. Under the district's existing student assignment plan, 19 schools have over 85 percent minority student enrollment. Under the HEW plan, all high schools and junior high schools would have Anglo majorities and only eight of 54 elementary schools would remain between 50 and 60 percent black and Mexican-American combined. (All eight would involve contiguous pairing.)

If the Austin case should turn out to be the model Administration response to the *Swann* decision, "cooperation rather than coercion" refers more to the politics of desegregation than to the process itself. The HEW plan was transmitted by letter to the Austin Superintendent with a copy to the judge, rather than directly to the judge as is sometimes the case. The letter began by complementing Austin school officials on their own plan, in which HEW said they had incorporated the concepts of the *Swann* decision and outlined an educationally sound approach.[6] The HEW letter then detailed the Department's recommendations for improvements upon the district's plan.

Questions from Austin

While the HEW-Justice Department plan for Austin seems to be a positive interpretation of *Swann,* two reservations are in order. HEW developed its plan without accurate and up-to-date pupil locator maps so that some of the boundary lines appear to be based on erroneous data. HEW officials have unofficially said they will amend the plan to correct these errors, which so far seem to have been bureaucratic in origin and not based on policy decisions. More importantly, while eight elementary schools will have enrollments of between 50 and 60 percent minority students, there are schools which are still overwhelmingly Anglo. Even though there are several non-contiguous pairing arrangements, there are 11 majority Anglo schools remaining in single school zones. Of these 11, five have over 85 percent Anglo enrollment, including one which is 100 percent Anglo. This imbalance may well lead to resegregation of some of the newly desegregated schools. The Federal Government's legal responsibility to insure that resegregation does not occur is, however, not clear.

The Supreme Court concluded *Swann* by holding that where adequate remedies for past segregation have finally been implemented, federal courts will not continue to require readjustment of attendance zones to reflect changing population patterns. The possible meaning of this is that once the last vestiges of the old system of official segregation have been eliminated, Southern school districts will be on the same legal footing as those outside the South in which subsequent racial imbalance resulting from changing residential patterns will not be attributed to the old *de jure* system. The Administration seems to be reading *Swann* as requiring the elimination of almost all, if not all, majority black schools (and Mexican-American schools, in the Austin case) without regard for the composition of the white schools. It is obviously going to use predominantly or all-white schools in non-contiguous pairings with black schools, but it is not going beyond the issue of predominantly minority schools to the com-

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bined issues of "tipping points" and racial balance assignment plans to erase the danger of resegregation. It seems to feel that in *Swann* the Supreme Court has said that elimination of identifiable minority schools is the end of public responsibility for eliminating the *de jure* system of segregated schools, and therefore, the last political controversy in Southern school desegregation. In its view, the South then becomes like the North, and the political implications of that are in the future and have decidedly different dimensions.

While the Administration has gone further than ever before, the fact remains that in the Austin case the Administration reacted defensively — from a direct order of a court outlining the necessity of some response.

Nashville Soundings

The Administration has repeated its Austin posture in a second case — Nashville, Tennessee. In Nashville, the plaintiffs are represented by the NAACP Legal Defense Fund, but the HEW Title IV Office was ordered to draft a desegregation plan. On June 1, HEW submitted a plan similar to the Austin one, eliminating the racial identification of at least 28 of 29 majority black schools and calling for extensive busing. But here too it left 38 schools (25 percent of all the schools in the system) more than 85 percent white, a situation which may well result in resegregation.

Most large urban areas in the South are involved in suits brought by the NAACP Legal Defense Fund. The Justice Department has intervened in some of these cases, and judges have often called upon HEW to develop the plans. Southern judges have tended to rely more on HEW plans than private plaintiff plans, and the Department of Justice must approve all HEW plans submitted in court cases. The Nashville action is at least a precedent for future Government action to eliminate most identifiable minority group schools in cases brought by private plaintiffs in which a judge orders them to draw up a plan. Some critics, however, have said that Austin and Nashville are "one-shot deals" and do not constitute a pattern. That remains to be seen.

Reopening Other Wounds?

Austin is a suit still before the courts but initiated long ago by the Department of Justice. The real question is whether the Justice Department will file new motions in cases now dormant, and whether HEW will renegotiate Title VI desegregation plans where they conflict with *Swann*. At least three of the HEW districts are large urban areas: Prince Georges County, Maryland, a suburb of Washington, D.C.; Columbia, South Carolina; and San Antonio, Texas. HEW and the Department of Justice have several medium-sized cities for which they are directly responsible. HEW, for example, is responsible for Marion County, Florida; Gulfport, Mississippi; Kinston City, North Carolina; Sumter, South Carolina; and Hampton and Alexandria, Virginia, while the Justice Department is responsible for Natchez and Hattiesburg, Mississippi; Florence, South Carolina; and Lubbock, Ector County (Odessa), Port Arthur, and South Park, Texas. The most certain indication that the Administration is responding in a consistent and comprehensive manner to the *Swann* decision will be its decision with respect to correcting plans with seriously imbalanced schools in small districts, many with majority black student enrollments. Two examples are Humboldt County, Tennessee and East Tallahatchie, Mississippi.

Humboldt County has approximately 2800 students, 43 percent of whom are black. Under the court-ordered desegregation plan not appealed by the Justice Department, 88 percent of black elementary school students attend a school which is 83 percent black. The other elementary schools are virtually all white. In East Tallahatchie, Mississippi, with a 2700 student enrollment which is more than 60 percent black, a consent decree was entered into by the school district and the Department of Justice. As described in *The Status of School Desegregation in the South, 1970:*

> The plan provides for a single "attendance center" for grades 7–12, made up of the former black and the former white high school. At each grade level, some courses are offered at one school and some at the other, and students are bused back and forth between the two "campuses."
>
> At the elementary school level, the district is divided into two zones. One zone produced a school projected to be about 84 percent black, but when our monitor visited the district after school opened, the school turned out to be all-black.
>
> The other elementary zone is served by a single 'attendance center,' made

> up of three schools. Each elementary student in that zone spends part of his school day at each of three schools, and of course, spends another large part of the day riding around between the schools in a school bus.
>
> This astonishing plan was apparently adopted in an effort to appease the local white community. White parents would not stand for their children attending formerly black schools for the whole day, but could tolerate them passing through these schools in the course of a bus shuttle tour each school day.[7]

If the Administration decides to pursue all the above types of cases consistently, one further question must be raised – when will it begin the comprehensive approach? It generally takes several months for HEW to notify a district that further change is required and to negotiate a settlement, and for the Department of Justice to file new actions, set a hearing date, develop a new plan, and get a judge to order it. School opens in less than two months. If the government does not act this summer, is it likely to act any nearer to Election Day 1972?

Administration Pathways

All the returns are not yet in on the question of how the Nixon Administration is responding to *Swann*. But if its actions to date are distinguished from its rhetoric, the Administration, at a minimum, has apparently started on a positive pathway toward eliminating minority group schools – but a cynical one ignoring the dangers of resegregation. There is nothing to suggest it will deviate from that path, but bitter experience has taught caution about characterizing this Administration's intentions with respect to school desegregation. The reasons for the Administration's initial positive position regarding the requirements of *Swann* are not immediately apparent, but may involve the following factors:

1) After closer examination, the Administration may have found that the problems of desegregating student assignment in many school districts has indeed been completed. The *Swann* decision deals with little other than the physical aspects of desegregation, and it probably has less effect on the Administration's required performance than the *Alexander* decision did. Furthermore, it sets forth conditions under which the Federal Government's responsibility is ended, at least as the Nixon Administration interprets it. The Federal Government has some large urban districts in the South for which it is directly responsible, but most urban areas are handled by private plaintiffs. Inaction of earlier Administrations – not so much for political reasons as for a lack of legal remedy in large southern urban areas with *de jure* segregated school assignment patterns reinforced by segregated housing patterns – resulted in private plaintiffs filling the litigant void. The Administration may have concluded that it could weather isolated political storms over the limited positive responses to the *Swann* decision.

2) While it would be a gross overstatement to speak of a wave of liberalism sweeping the South, it is not too much to say that the blatant politics of race, as practiced throughout the South in the past, are no longer acceptable in most quarters. This must have been perceived by even the "Southern strategists" within the Administration. Those who have counseled that policies designed to capture the Wallace vote were essential to a second term for this Administration may not be calling the shots. Instead, the Administration may be reacting politically to some moderate straws in the wind – to the successful campaign of Governor John West in South Carolina against his racist Republican opponent, former Congressman Albert Watson; to the public acceptance of the moderate posture of Republican Governor Linwood Holton of Virginia on the race question; the election of Governor Reubin Askew and Senator Lawton Chiles in Florida, and Governor Jimmy Carter and the appointment of Senator David Gambrell in Georgia; and the reported problems of Governor George Wallace in his home state of Alabama. Much of the moderation on the race question appears to have occurred in the Democratic Party, the traditional seat of Southern racial politics. If this could happen in the Democratic Party, the Administration strategists may have reasoned, perhaps – just perhaps – the Republican Party likewise can afford to deal with issues of equal educational opportunity, discrimination in education and segregated schools on the basis of substance without suffering politically. As the conservative columnist and former Mitchell aide Kevin Phillips wrote on June 22:

> The major ingredient of President Nixon's new suburban housing policy appears to be political fakery.

> Mr. Nixon is following the same pattern he has followed in his 'defense' of the neighborhood school – a heavy opening barrage of conservative rhetoric followed by a subsequent activity in the other direction.
>
> ... Actually, Nixon officials know they will be moving in liberal directions – with a zig-zag or two – from the moment they completed their calculated conservative public relations buildup.

If indeed the Administration intends to react to race-related issues in the way suggested by Mr. Phillips, perhaps that may account – at least in part – for what appears to be a relatively positive Administration reaction thus far to court rulings on school desegregation and particularly to the Supreme Court's *Swann* decision.

3) There are now other issues in the school desegregation/integration struggle which may be or will be causing greater administrative and political headaches for the Administration than the physical desegregation issues dealt with in *Swann*. These include (1) the government's responsibility to desegregate northern schools; (2) the growth of segregated private schools as alternatives to public education both North and South, along with the financial crisis of traditionally segregated parochial schools; (3) the signs (such as the school suit in Richmond, Virginia) of possible legal requirements that all metropolitan area schools must be integrated; (4) the destruction of black authority figures in Southern schools through the dismissal and demotion of black principals and teachers; (5) the problems of in-school segregation and of discrimination against students, especially through the use of culturally-biased tests and ability grouping; (6) the general nationwide phenomena of racial conflict and unrest in high schools; and (7) the emerging legal mandates to correct fiscal inequities, at state levels particularly, but also at the federal levels, in the financing of public schools.

With these issues facing them, the Administration may have decided to put the easier issue – physical desegregation – behind it once and for all

FOOTNOTES

1. *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S.Ct. 1267 (1971); *North Carolina State Board of Education v. Swann*, 91 S.Ct. 1284 (1971); *McDaniel, Superintendent of Schools v. Barresi*, 91 S.Ct. 1287 (1971); *Davis v. Board of School Commissioners of Mobile County*, 91 S.Ct. 1289 (1971); *Moore v. Charlotte-Mecklenburg Board of Education*, 91 S.Ct. 1292 (1971).

2. Through the early months of the Nixon Administration, the Federal Government attacked school segregation on two fronts – in court by the Department of Justice under Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment, and administratively by HEW under Title VI of the Civil Rights Act of 1964. Subsequently, the use of Title VI was abandoned and practically all enforcement responsibility was transferred to the Department of Justice. The NAACP Legal Defense and Educational Fund, Inc. is currently suing HEW for failure to enforce Title VI.

3. "Underlying these problems is the mistaken belief that desegregation is simply the mixing of black and white students in schools and no more. Little attention has been paid to the way in which student assignment has been carried out or to what happens to black students and faculty in 'desegregated' schools. The latter concerns are sometimes viewed as 'second generation' desegregation problems which, it is thought, will work themselves out after the 'primary' task of mixing the bodies is accomplished." *The Status of School Desegregation in the South, 1970*, a Report by the American Friends Service Committee; Delta Ministry of the National Council of Churches; Lawyers' Committee for Civil Rights Under Law; Lawyers' Constitutional Defense Committee; NAACP Legal Defense and Educational Fund, Inc.; and the Washington Research Project; December, 1970; p. 2.

4. The Cabinet Committee on Education, originally chaired by Vice President Agnew, is now chaired by George P. Schultz, Director of the Office of Management and Budget.

5. The judge had ordered the HEW Division of Equal Education Opportunity (Title IV Office), the technical assistance unit under Title IV of the Civil Rights Act of 1964, to draw up the plan for the Department of Justice.

6. "Having had an opportunity to review that proposal, we note that your Board has put forth a plan of desegregation which embraces those concepts of student assignment, such as non-contiguous zoning, which have been recognized by the United States Supreme Court in the recent *Swann* decision as legitimate tools for achieving stable and educationally sound desegregation in former *de jure* school systems.

   "Although we have not yet completed a definitive review of your locally developed proposal, we believe it provides the basis for an educationally sound approach. We, therefore, wish to offer the following comments on your proposal which we hope will assist you and, according to its request, the Federal District Court in Austin in meeting current United States Supreme Court standards. We feel that it would be more helpful to you and to the District Court for us to start with the essentially sound elements of your plan, taking into account the judgments of both your school board and the Tri-Ethnic Citizens Advisory Committee which it appointed." Letter of May 14, 1971, from Mr. Tom Kendrick, Senior Program Officer, Dallas Office of Division of Equal Educational Opportunity, U.S. Office of Education, to Dr. Jack Davidson, Superintendent, Austin Independent School District, p. 1.

7. *The Status of School Desegregation in the South, 1970*, p. 16.

Segregation, Northern Style*

by Paul R. Dimond

School segregation in the North is pervasive and, with the exception of a few communities which have implemented system-wide desegregation plans, it is growing.** The question facing the courts is whether this school segregation violates the 14th Amendment. This article describes recent court actions which have held that it does and explains the reasons why.

Examination of Northern school segregation decisions, and the proof underlying them, suggests that in recent years courts have revisited the issue with far greater sophistication than previously. Courts are coming to understand that for many years authorities in almost every community have assigned pupils and teachers to particular schools. School segregation, therefore, has not just "happened" and is not adventitious, but has resulted from the actions of public officials. In such circumstances, it is not surprising that school segregation, North as well as South, is viewed as "state-imposed" and unconstitutional under the 14th amendment.

The early "northern" school segregation decisions were few and conflicting. Three circuits held school segregation constitutional in Cincinnati, Gary and Kansas City,[1] while the 2nd circuit reached the opposite result in New Rochelle.[2] At the time these decisions were made, "free choice" pupil transfers in formerly dual school systems seemed permissible, and the affirmative 14th amendment obligations regularly applied to review of allegations of racial discrimination[3] had not yet been clearly applied to any school segregation.[4] *Green v. County School Board* [391 U.S. 431 (1968)] removed any lingering doubts: the traditional affirmative obligation under the 14th amendment was "in," and any form of "free choice" which did not end school segregation was "out." Since that time, a spate of decisions has consistently held school segregation actionable in many "Northern" cities: South Holland (Illinois),[5] Pasadena,[6] Las Vegas,[7] Los Angeles,[8] Pontiac (Michigan),[9] Benton Harbor (Michigan),[10] Denver,[11] San Francisco,[12] and Oxnard County (California).[13] Significantly, district and circuit judges have used a variety of constitutional theories to get around previous decisions in order to hold school segregation unconstitutional. *Swann*[14] – with its strong language on faculty assignment, equalization of facilities and resources, and school construction – only lends support to such decisions.

Paul Dimond, a staff attorney at the Center for Law and Education, is currently co-counsel in a Detroit school desegregation suit.

Proof in the Segregation Pudding

In the new Northern cases, proof of a pattern of segregation has also been important to the judicial review of school segregation. This proof usually starts with statistics showing the extent of pupil segregation: the number and percentage of all or predominantly black and white schools, and the number and percentage of black and white pupils attending racially separate schools. In a hypothetical school system with 5,000 white and 5,000 black pupils, if 4,750 black pupils are isolated in schools with 250 whites and 4,750 white pupils are isolated in separate schools with 250 blacks, these figures, standing alone, should speak thunder under any theory of constitutional law. Even if a particular judge is straining to find a Grand Canyon dividing the respective black and white school populations (more than a

*By "Northern," I mean places where racially dual schools were not mandated by explicit statements of public policy as was the case in many places on which I bestow the under-inclusive appellation "Southern." (After all, *Brown I did* include cases from Kansas and Delaware.)

**In the Continental United States 68.0% of all blacks attended 80–100% minority schools in 1968; in 1970 it had dropped to 49.4%. But in the 32 Northern and Western states, 57.4% of all blacks attended 80–100% minority schools in 1968; and in 1970 it was still 57.6%. Table 2-A, *HEW NEWS*, June 18, 1971. The large urban areas in these states have even greater segregation.

railroad track presumably would be required), adequate justification for such a school system, dual in fact, will be difficult to find.[15]

In many school systems, however, the racial separation of pupils is often not that complete; where the statistics on pupil segregation do not speak so distinctly, other proof may show a constitutional violation just as clearly. School authorities have considerable discretion in assigning teachers and pupils to schools, constructing and locating schools and attendance boundaries, choosing initial student assignments, and setting transfer policies and enforcing them. Careful examination will reveal choices and practices, and their effects, which operate to segregate schools on a racial basis.

I. Teacher Hiring and Assignment

Perhaps the most obvious, and telling, evidence concerns teacher hiring and assignment. Whenever there are disproportionately few black faculty in any community's public schools, relative to the adult racial mix, there is a considerable likelihood of racial discrimination in hiring. Perhaps more telling is a pattern of black teachers being assigned primarily to schools with high concentrations of black students and white teachers primarily to schools with predominantly white student bodies. Schools are thereby identified as "black" or "white" by the faculty assignment,[16] and the inference of racial discrimination in teacher assignment is appropriate.

School authorities have little basis for asserting that "neighborhood" schools, transportation problems, or lack of control over the assignment of teachers are adequate justification for the prima facie racial assignment of the faculty.[17] Moreover, such racial patterns and practices in the hiring and assignment of faculty, over which school authorities undeniably have control, compel more careful scrutiny of patterns and practices of pupil assignment and any asserted justification therefore. [See, e.g., South Holland, Ill. and Pontiac, Mich.]

II. Pupil Assignment

The assignment of pupils to various schools often involves many processes. Where schools rely on geographic zoning for pupil assignment, the drawing of boundaries and the policing of the assignments, the size of schools, the grade structure, and the construction and location of new schools, additions to old ones, and placement of portable classrooms all help to determine which students attend particular schools. The pupil composition of schools is further affected by exceptions to strict reliance on geographic zoning. These include transfer policies ("optional zones," "free transfer," "free choice," "open enrollment," "majority to minority," "to promote integration at the receiving school"), transportation practices, and school plant use (i.e., practices relative to overcrowding and undercrowding of school buildings). I include plant utilization – over and undercrowding – in the set of practices which deviate from geographic zoning because administrative practice to equalize plant use may depart from geographic zoning. Manipulation of geographic attendance zones, of course, is also a possible response.

A. Exceptions to Geographic Zoning

This set of practices often reveals how acts of school authorities create and perpetuate school segregation. "Optional zones" usually straddle the edges of geographic attendance zones to permit students to attend either school. Whenever optional zones exist between a predominantly black and a predominantly white school, their purpose is usually to allow whites to flee from the "black" school to the "white" one.* The almost invariable effect is that whites "choose" to attend the "white" school and blacks, with a few exceptions, the "black" school. In many instances, the constraints on choice inherent in the existence of the optional zone, and the identifiability of the schools, are further accentuated by the hostility school authorities show the few students who attempt to opt for the school of the opposite race.** [See, e.g., *Hobson I,* 269 F. Supp., 401, 415–17, 499, 501; and Denver].

Similarly, "free transfer" and "open enrollment" policies – with transportation provided and space guaranteed at the receiving schools – often operate to intensify school segregation. While these policies theoretically allow any student to transfer from his school of geographic assignment

*An Identifiably "black" school is defined as a school with a disproportionately black student body and disproportionately black faculty relative to the system-wide racial mix; a "white" school has a disproportionately white student body and faculty.

**Such hostility includes silent acquiescence in the pressures applied by students and their parents, especially white, to the child of one race that applies to the school of the opposite race, and simply lying about spaces available.

to any other school in the system, purely racial reasons often can be shown to govern the transfer choices. In other instances, subtle pressure by school authorities may also promote a white flight from "black" schools, while discouraging a similar transfer by black students into "white" schools. Invariably, "free transfer" and "open enrollment" policies increase segregation: hordes of whites flee their geographically-assigned schools which are perceived as "black"; no whites transfer into "black" schools; very few blacks transfer into "white" schools; and some blacks "transfer" from "white" to "black" schools. [See, e.g., *Monroe v. Bd. of Commissioners of Jackson, Tenn.*, 391 U.S. 448 (1968)]. "Hardship" and even "majority-to-minority-transfer" policies must also be closely examined, for in practice their enforcement may be honored in the breach and operate to segregate schools.* [See Pasadena and the May 22, 1971 Order of the Massachusetts Commission Against Discrimination].

Bus Transportation and School Utilization

Regardless of a system's transfer policies, the actual transportation of children may show how school authorities segregate schools. Black children may be bused to "black" schools past predominantly "white" schools with space available, or white students may be transported to "white" schools past predominantly "black" schools with space available. This patently "dual" transportation sometimes occurs under the guise of relieving overcrowding and maximizing the efficient use of the school plant. Only somewhat less subtle is one-way busing to "white" schools of white students who live much closer to "black" schools with available space. [See South Holland].

The pattern of school plant utilization may also provide proof of racial segregation. "Black" schools may be overcrowded while "white" schools have space. Or "black" elementary and "white" secondary schools may be overcrowded, while "white" elementary and "black" secondary schools are undercrowded. Or there may be a mix of "black" and "white" schools over- and undercrowded. In each case, the equalization of school plant use could desegregate schools substantially. Under these circumstances, school authorities are faced with the choice of equalizing school plant use to integrate, or to segregate, or not to equalize plant use at all and perpetuate segregation. When over and undercrowding is clear and consistent over time, the failure to integrate by equalizing use of school plants constitutes a choice to impose segregation: it is the election of an option which intensifies segregation. [See Pasadena].

Under any of these exceptions to geographic zoning, white students will never be transferred from "white" schools to "black" schools. [See San Francisco, slip op. at 18]. That practice is an archetype of how school systems cater to the flight of whites and their hostility to association with blacks. In determining and enforcing transfer, transportation and plant use policies, school authorities diverge from what they claim may be a general policy of "neighborhood" zoning. The way they are implemented may reveal not only how school authorities have chosen to impose segregation in any particular instance, but also how the "neighborhood" schools are intended to operate to contain blacks in separate schools.[18]

B. Manipulation of Geographic Zones

To examine geographic zoning as a basis for school assignment is necessarily to examine the relationship between attendance areas, actual school assignments, and residential patterns. These relationships must be subjected to searching judicial scrutiny. Assertions that school segregation results "from a neutral neighborhood school policy and housing patterns over which the school board has no control" should not be blindly accepted. When courts examine school officials' actions, school composition, and housing patterns, the following practices and patterns of state-imposed segregation in the schools are likely:

School Boundaries

- Contiguous school attendance zones contain black and white children in separate schools. [See e.g., South Holland, Ill.].
- School boundaries track a sharp demarcation between white and black residential areas. [See, e.g., New Rochelle, South Holland, and Pasadena].
- Railroad tracks (or other arguable barriers) are used as school boundary lines when only blacks live on the other side, but attendance boundaries cross the tracks freely when both blacks and

*Even if the only transfer policy in a school district is the constitutionally appropriate "majority-to-minority" variety with transportation and space guaranteed, *Swann* at 1281, and that policy is rigorously enforced, the results are predictably small: a few blacks elect to transfer to "white" schools and no whites elect to transfer to "black" schools.

whites live on either side. [See, e.g., Pontiac and South Holland].

- School attendance zones generally follow residential patterns that maximize school segregation. [See San Francisco and Pasadena].
- When black residential areas expand, school boundaries are altered or maintained to perpetuate the containment of blacks and whites in separate schools. [See, e.g., Pasadena; *Hobson v. Hansen* (supplemental order of Jan. 1971); *Branche v. Board of Ed.*, 204 F. Supp. 150 (E.D.N.Y. 1962)].
- Where pockets of one race reside within a large area of the other race, attendance zones coincide with the pocket and students living there are assigned to a non-contiguous school of their own race or, the equivalent, a school within the pocket just large enough to serve the students living there.
- Where attendance zones encompass a mixed population, schools often remain predominantly black because whites are allowed to slip into other schools. The failure to enforce zone lines strictly may make every attendance area an "optional zone" for whites who wish to escape to a "white" school. [South Holland].
- Despite this variety of manipulations, the school attendance zones of predominantly white residential areas are never altered to feed into a "black" school. [San Francisco, e.g.].

School Size

School capacities may vary with the racial composition of residential areas in a district. Large schools may serve vast areas which are predominantly black or white, but at the edges between white and black residential areas, smaller schools may minimize interracial education. Or school size may be finely tuned to meet the exclusive needs of a particular racial pocket.

Grade Structure

The grade structure of schools may also be varied to segregate schools. Because the area served by a school varies with the number of grades it serves, schools may be structured (e.g., K–8 and 9–12) so that all schools in an area are predominantly of one race. An alternative grade structure (say, K–6, 7–9, 10–12) might lead to substantial integration in the very same schools. [See, e.g., South Holland].

*"If school authorities fail in their affirmative obligations . . . judicial authority may be invoked . . . In default by the school authorities . . . a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann* at 1276.

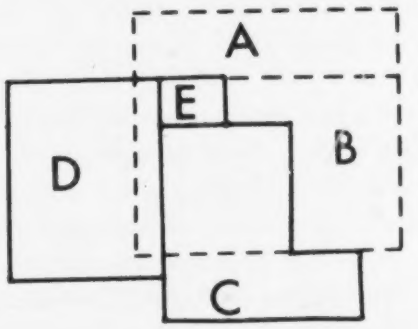
Contruction and Location of New Schools, Additions and Portable Classrooms

The size and location of new schools throughout a school district – in conjunction with attendance boundaries, grade structures, and teacher assignments – frequently create schools which open and remain predominantly white or black. [See, e.g., *Swann, Johnson, Soria, Spangler*]. In view of the vast range of options available to school officials in each decision, a pattern of predominantly one-race schools is strong evidence of that "quantum" of "state-imposed" segregation which compels judicial intervention to enforce the Constitution in the face of default by public officials.* [See, e.g., Pontiac, Mich.]. A careful examination of the situation at the time of each new school opening – including the underlying residential pattern and the options available to school authorities – will usually confirm the inference compelled by the pattern.**

An Example In Concrete

An example of how the "neighborhood" school policy is used may clarify how school authorities build upon residential segregation to impose segregation in schools.

In the diagram below, A, B, C, D, and E represent existing attendance areas and their respective elementary schools for about 30 square blocks in a densely populated section of a city. The chart shows the date of construction, capacity, and enrollment by race for selected years.



**"The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex . . . The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system . . . [C]hoices in this respect have been used as a potent weapon for *creating and maintaining a state segregated school system. . . . In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. Swann* at 1278-79 (emphasis added).

Year School Opened	School & Attendance Area	Date	Black	White	Capacity
(1930)	A	1950	0	600	800
		1960	0	800	800
		1970	3	1000	800
(1930)	B	1950	0	800	1000
		1960	15	900	1000
		1970	37	1200	1000
(1960)	C	1950	—	—	1100
		1960	20	1100	1100
		1970	80	1200	1100
(1960)	D	1950	—	—	1100
		1960	20	1100	1100
		1970	40	1200	1100
(1944)	E	1950	550	0	500
		1960	440	3	500
		1970	350	1	500

Schools A and B opened in 1930 and served the entire area within the dotted line, except for a few black children living in shanties in swampy area E. (They walked several miles to a predominantly black school in the inner city.) Eventually, black immigrants to the city, and others from congested downtown areas, joined the black families already in E. Real estate authorities marked off the edges of E and, with the support of neighborhood associations, encircled it by filing racially restrictive covenants, enforceable by state courts, in surrounding areas. World War II and the migration of blacks to work in factories to support the troops brought many more blacks into E.

Federal war housing authorities could not (by their own policy) build housing for blacks except in areas already occupied by them. Because E was one of the few black areas in the city with vacant land, temporary war housing for blacks was built there over the strenuous objections of whites in surrounding areas. School officials in cooperation with federal housing authorities, planned and built a 500 pupil, K–6 school for E-area blacks even though space was available in schools A and B and other nearby "white" schools. The attendance zone for the new school coincided exactly with the black residential area. The crush of black immigrant war workers and the racial restrictions on occupancy in other areas of the city, however, resulted in 700 E-area black elementary students when the school opened. Black persons were directed by both white and black real estate brokers into E. White brokers counseled whites to avoid E. Black brokers could not sell in areas not already having some black families. As a result, only 550 were transferred back to E from the downtown "black" schools they had previously attended; despite available space in A and B, the remaining black elementary children remained in "black" inner city schools. Meanwhile, enterprising whites on the eastern border of E built a brick and cement wall on the school and residential boundary of E, presumably to prevent encroachment by blacks. Both the wall and the coincident school boundary remain today.

By 1953 the temporary war housing was eliminated, and the number of black elementary and junior high students in the E area had declined to 400. In 1953, E became a K–9 school to serve these students, and 100 blacks from overcrowded inner city schools were assigned to E until 1965. During the 1950's, the white residential areas surrounding E grew rapidly, leading school officials to build two new schools to serve 1100 pupils each. The boundaries of the new schools extended away from E to permit their "full use"; the boundaries for E, of course, remain unaltered despite the ease with which E could have been paired with any of the surrounding schools, (E becoming K–2 and the paired school 3–6). The 75 black junior high students in E then could have been assigned to the "white" junior high which served A, B, C, and D.

By 1970, E became a K–6 school again with only 400 elementary students living in the area. Despite a new policy of relieving overcrowding to promote integration, no students from the overcrowded A, B, C, or D schools were transferred to E, nor were boundaries redrawn, or E paired with contiguous schools. Although transfers promoting integration were permitted, no whites transferred into E and only 50 blacks transferred out.

Lessons from the Concrete

At many points in this tale, school officials made choices which contained blacks and whites in separate schools. Any number of available alternatives could have integrated schools in the area.

Write large this single example of a black "pocket" (with a few variations to fit the expansion of the ghetto and the variety of segregatory techniques available to school officials) and the practice of school officials in most cities and towns where blacks attend separate schools will emerge. Add that many cities in the 1960's recommended plans for school desegregation and the removal of the racially identifiable pattern of faculty assignment and resource allocation. Add that these were adopted as general policy guidelines, but were rejected or only partially implemented in practice. [See, e.g., San Francisco]. In some cities specific desegregation plans were rejected, or adopted and then rescinded, in the face of white hostility to desegregation. [See, e.g., South Holland, Pasadena, Denver, and *Bradley v. Milliken,* 433 F.2d 897 (6th Cir. 1970).] Add that residential patterns result from all forms of public and private racial discrimination[19] and that schools do affect housing choices.[20]

In such circumstances, the state's imposition of segregation in schools is difficult to deny. The burden shifts to school authorities to justify their failure to elect alternatives and make decisions which minimize segregation. The "neighborhood" school policy underlying these practices must also be justified in light of the school segregation it creates and maintains. When adequate justification is not forthcoming, as it almost never can be, earlier Northern court decisions upholding "neighborhood" schools will be distinguished. The Sixth Circuit's opinion in *Davis* (Slip Op at 5) provides a clear example:

> Although each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a *purposeful* pattern of racial discrimination has existed in the Pontiac School system for 15 years.

The *Davis* court evaluated the Pontiac school authority's purpose from the effect of its actions and its failures to act.[21] The court examined the options available to school authorities for pupil and teacher assignments; where they chose alternatives leading to greater racial separation, the resulting segregation was held to be unconstitutional.

Independent Appellate Review

The major question still unanswered after *Davis* is whether appellate courts will review records independently in order to overrule recalcitrant district judges who uphold school segregation because they find no evil intent from the racial effects. When lower courts view this pattern of facts and find no "purpose" to segregate, independent appellate review must be made if the courts are to apply the affirmative 14th amendment standard traditionally used in reviewing all other claims of racial discrimination.[22]

All Segregation Unconstitutional

When the factors underlying school segregation and the alternatives available to school authorities are subject to searching scrutiny, including independent appellate review, the rights of Northern as well as Southern black school children will no longer depend on the ill will or the caprice of school authorities or district judges. The much trumpeted distinction between "de facto" and "de jure" will reach a final deserved resting place. Those labels have always been conclusions; neither is very descriptive nor analytic. By definition, "de jure" means actionable under the 14th amendment; "de facto," not actionable. If, consistent with the historic 14th amendment analysis of racial discrimination in all other areas of life, courts require school authorities to justify segregation by showing the promotion of a compelling state interest by the least onerous (segregatory) means, most Northern school segregation will fall. School authorities will be unable to bear that burden of proof of adequate justification. The

point is not that "de facto" school segregation is unconstitutional, but that all public school segregation is "de jure." That turnabout is consistent with the *Brown* court's answer to *Plessy*: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [347 U.S. at 495].

That judgment has nothing to do with achievement test scores, or any implication that black children make "black" schools inferior. It is based on the fact that segregation in the public schools, North and South, is imposed on black people by a dominant white majority which is intent on containing blacks in separate neighborhoods and schools. When that intent is fulfilled in the public schools, in which most of us, for better or worse, are compelled by law to attend for over a decade, the minimum objective remains, as the Supreme Court said in *Swann,* "to eliminate all vestiges of state-imposed segregation."

FOOTNOTES

1. *Deal v. Cincinnati Bd. of Ed.,* 369 F.2d 55 (6th Cir. 1966), cert. den., 387 U.S. 935, on remand, 419 F.2d 1387 (6th Cir. 1970), cert. den. because petition untimely filed, 91 S.Ct. 1630; *Bell v. School of Gary,* 324 F.2d 209 (7th Cir. 1963), cert. den., 377 U.S. 924; and *Downs v. Kansas City,* 336 F.2d 988 (10th Cir. 1962), cert. den., 380 U.S. 914.

2. *Taylor v. Bd. of Ed.,* 294 F.2d 36 (2d. Cir. 1961), cert. den., 368 U.S. 940 [hereafter referred to as New Rochelle].

3. See, e.g., *U.S. ex rel. Seals v. Wiman,* 304 F.2d 53, 65-66 (5th Cir. 1962); *Avery v. Georgia,* 345 U.S. 559, 561 (1963).

4. *Brown I, Cooper v. Aaron, and Griffin v. Prince Edward County,* of course, required affirmative action. But the invention of "all deliberate speed" in *Brown II* and the slow progress of desegregation made many believe, or hope, that somehow the 14th amendment was to be read with a malign neutrality for purposes of review of school segregation.

5. *U.S. v. School District 151,* 404 F.2d 1125 (7th Cir. 1969), on remand, 301 F. Supp. 201 (N.D. Ill. 1969), aff'd as modified, 432 F.2d 1147, cert. den. [hereafter referred to as 151 or South Holland].

6. *Spangler v. Pasadena Bd. of Educ.,* 311 F. Supp. 501 (C.D. Cal. 1970) [hereafter referred to as *Spangler* or Pasadena].

7. *Kelley v. Brown,* Civ. No. LV-1146 (D. Nev. Dec. 2, 1970).

8. *Crawford v. Bd. of Educ.,* Civil No. 822854 (Los Angeles Super. Ct. May, 1971).

9. *Davis v. School Bd. of City of Pontiac,* 309 F. Supp. 734 (E.D. Mich. 1970), aff'd F.2d (6th Cir. 1971) [hereafter referred to as *Davis* or Pontiac].

10. *Berry v. School District,* Civ. No. 9 (W.D. Mich., Feb. 17, 1970) [hereafter referred to as *Berry* or Benton Harbor].

11. *Keyes v. School District No. 1,* 302 F. Supp. 279 (D. Colo. 1969), 313 F. Supp. 61 and 90 (D. Colo. 1970), aff'd in part and rev'd in part, F.2d (10th Cir. 1971) [hereafter referred to as *Keyes* or Denver].

12. *Johnson v. San Francisco Unified School District* (N.D. Cal. April 28, 1971) [hereafter referred to as *Johnson* or San Francisco].

13. *Soria v. Oxnard School District Bd. of Trustees,* Civil No. 70-396 (C.D. Cal. May 12, 1971) [hereafter referred to as *Soria*]. In addition, at the close of plaintiffs' proof in *Bradley v. Milliken,* Civ. Act. No. 35257 (E.D. Mich. June 16, 1971) (Detroit) the district court held that plaintiffs had established a prima facie case and issued an injunction, *pendent lite,* on all school classroom construction — new buildings, additions, and portables.

14. *Swann v. Charlotte-Mecklenberg Bd. of Ed.,* and companion cases, 91 S. Ct. 1267 et seq. (April 20, 1970) [hereafter referred to as *Swann* or Charlotte].

15. In Mobile, the Supreme Court found use of a major public highway as a barrier to school desegregation an inadequate justification for continuing school segregation. *Davis v. Board of School Commissioners of Mobile,* 91 S.Ct. 1289. Compare the conclusion of the district court in South Holland, Ill.:

> [S]tandards and procedures pursuant to which pupils are assigned to schools, which are alleged to be racially discriminatory and which have resulted in exclusively white student bodies in regular classes in certain of a district's schools alongside almost exclusively Negro student bodies in the district's remaining schools, are subject to the most intensive judicial scrutiny . . . [301 F. Supp. 201, 230].

16. Usually, any doubts on this score can be clarified by the past practice of assigning no black teachers to all white schools or removing any black teacher assigned to such schools when white parents protest the invasion.

17. "In its assignment of faculty, a school district is burdened with none of the impediments otherwise present in a desegregation plan. The limiting effect of attendance zones and difficulties of transportation are not present in this area to any substantial degree." *U.S. v. Bd. of Education, Tulsa, Oklahoma,* 429 F.2d 1253, 1260 (10th Cir. 1970); "Defendants and their predecessors undeniably had actual and legal control. . . with respect to the racially patterned allocation of faculty and staff during the pertinent period. . ." *U.S. v. School Dist. 151,* 301 F. Supp. 201. Nor have labor contracts to the contrary ever been recognized as being of any weight, let alone controlling, for purposes of analysis under the 14th amendment.

Photo by: Patricia Hollander

18. Proof of resource disparities between predominantly black and white schools may serve a similar function. Yet equality of objectively measurable facilities between black and white schools may also be a belated attempt to buy off desegregation at the price of resource equalization.

19. The involvement of public officials in the patterns of housing segregation is startling. The F.H.A. and its predecessor agencies long encouraged developers and owners to use racially restrictive covenants and to create racially homogeneous neighborhoods. To this day, the F.H.A. has not taken adequate precautions to insure that new housing is open in practice to all races; nor has the F.H.A. taken any affirmative action to alter the racially separate residential patterns it helped to create. Discriminatory real estate marketing and advertising practices, undertaken by licensees of the states, are notorious and pervasive. Public housing authorities everywhere built racially separate projects and still refuse to build racially mixed projects in white residential areas. This litany of public and private housing discrimination could go on; the discrimination and its long persisting effects certainly do.

    Upon viewing such facts, post-*Green* courts have consistently held that a neighborhood school policy neutral on its face is an impermissible imposition of segregation in the schools. See, e.g., *Brewer v. School Bd. of City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968); *Henry v. Clarksdale Municipal School District*, 409 F.2d 682, 687-689 (5th Cir. 1969); *Spangler v. Pasadena City Bd. of Ed.*, 311 F. Supp. 734, 742 (C.D. Cal. 1970); *U.S. v. Tulsa*, 429 F.2d 1253 (10th Cir. 1970). In such circumstances, any neighborhood school policy may serve to contain blacks and whites, already resident in separate neighborhoods by "state action," in racially separate schools.

20. "People gravitate toward school facilities. . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Swann* at 1278. By identifying schools as primarily black or white, school authorities are, at least in part, responsible for racially separate housing patterns.

21. "The purpose of legislation is to be determined by its natural and reasonable effect, and not by what may be supposed to have been the motives upon which the legislature acted." *New York v. Roberts*, 171 U.S. 658, 681 (1898) (Harlan, J., dissenting).

22. See, e.g., *Coleman v. Alabama*, 389 U.S. 22, 23 (1967).

The Sociology of Multiracial Schools

by Robert L. Green, John H. Schweitzer, Donald S. Biskin, and Lawrence W. Lezotte

The ideas discussed in this article reflect the authors' commitment to multiracial schools, nondiscrimination, and equitable treatment for minority students and school personnel after desegregation. Based on our experiences as social scientists and educational researchers, and as expert witnesses and research consultants in three major school desegregation cases,[1] our philosophy of multiracial schools rests on three assumptions: (1) that multiracial schools provide optimal conditions on which to build an egalitarian multiracial society; (2) that school segregation is detrimental to the educational and psychological development of majority and minority children; and (3) that multiracial schools are effective settings for teaching attitudes and behavior essential to dissolving and reducing racial tension. We also believe that multiracial schools are obtainable if the nation will commit itself fully to pursuing the basic principles of the American Constitution.

Although we are committed to multiracial classrooms, we are aware of the negative ramifications they may have for the black community. A recent Race Relations Information Center[2] report, for example, indicates some negative effects of desegregation on black teachers in the South. A black male with 25 years of experience as a principal was assigned to teach social studies and history to seventh graders. A woman with nine years experience scored two points below B certification and did not receive a new contract from her school. A home economics teacher of 23 years was fired for "incompetence" five days after signing her new contract to teach second grade. As these examples illustrate, court actions pressing for multiracial classrooms are not enough. Social scientists must help develop systems to protect minorities from becoming victims of intense racial discrimination in a new system of multi-racial education.

This problem is complicated by the fact that there is no readily-identifiable standard to which school desegregation efforts can be directed. Theoretically, it makes little difference whether desegregation activities rest on a specific majority-minority student ratio or upon proportional representation. What is important is that the results reflect non-extreme racial composition. The numbers (quota) "game" may become a quagmire which deters rather than facilitates multiracial school efforts. Consequently, the only helpful general recommendation is that every attempt be made to eliminate the racial identifiability of schools.

Uniracial Schools Harmful

We believe that racially identifiable schools (white as well as black) have harmful effects on the achievement, self-concepts, and attitudes of all students. While the exact proportion of minority and majority children is not as important as the perceptions of the administrators, teachers, parents and children, any racially identifiable school carries artificial connotations of inferiority or superiority with negative impact on school programming and attitudinal development.

The concept of racially identifiable schools is relative. In one school district a school with 40% black students might be perceived as multiracial, while in another district it would be racially-identifiable. The effect of being perceived as racially distinguishable, however, is not ambiguous: the white educational establishment is able to set minority youngsters aside in isolated educational settings and deny them the full range of cognitive and affective educational experiences.

White parents often change their children's school because they believe that education at predominately black, Mexican-American, or Puerto Rican schools is inferior. Minority parents

Robert L. Green is a professor of educational psychology and the director of the Michigan State University Center for Urban Affairs. John H. Schweitzer and Donald S. Biskin are instructors at the Center, and Lawrence W. Lezotte is an assistant director of research there.

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believe, often justifiably, that minority school resources are less adequate and the teaching personnel less experienced and trained than they are in majority schools. In *Berry*, for example, (and many other cases),[3] teachers with fewer credentials were shown to be assigned to the black schools. A report on Chicago schools[4] showed that inner city schools employed 36% full-time substitutes while no other Chicago schools averaged more than 14%. Eighty-two percent of all Chicago substitutes taught in inner city schools. And the median years of teaching experience in the inner city was four, compared to 19 in upper income schools, 15 in middle income schools, and nine in lower income schools elsewhere in the city.

These facts undermine many minority parents' belief that the educational system works in the best interest of their children. And children, both minority and majority, are quick to internalize their parents' perceptions of the school they attend. Minority students soon develop resentment, hostility, and resignation because they perceive, and often know, that their education is inferior. White children, on the other hand, often develop feelings of superiority which the educational system fails to counter. They develop a need to keep a distance between themselves and minority children, and the education system reinforces this directly. A vicious cycle resulting in greater separation, both physical and psychological, develops, and the self-fulfilling prophecy of inferior minority schools is continued.

That school segregation is detrimental to the educational and psychological development of both majority and minority children is a well-documented fact. Racially isolated schools do not and cannot promote the attitudes necessary for functioning in a multiracial society. If they did, there would be no need to modify many existing education systems. But since they do not, they must be changed into multiracial learning environments.

Multiracial Classrooms Needed

Merely attaining a multiracial composition within a school is not sufficient to eliminate racial isolation. A mix within each classroom is necessary to eliminate the deleterious effects of racial isolation. Many Southern school districts have blatantly violated the spirit of desegregation orders by creating all-black classrooms within nominally integrated schools. Recently classroom segregation was discovered, for example, in 125 districts.[5] In the North this kind of segregation is produced by "tracking": homogeneous "ability" groupings usually produce predominately black and predominately white classrooms within multiracial schools.[6] Although no evidence proves that tracking improves either the quality of instruction or achievement, there is compelling evidence that the creation of racially identifiable classrooms has grave negative consequences.[7] One researcher,[8] using data originally gathered for the Coleman Report, found that minority students do not benefit from attendance at multiracial schools if they remain in segregated classes. In fact, racially identifiable minority classrooms within a majority white school were found to be *more* detrimental to minority student achievement than were racially identifiable minority schools within a majority white school district. Undoubtedly, the dynamics of negative perceptions toward black schools are also at work in predominately white schools in the development of perceptions regarding black classrooms and artificial views of superiority. The whole system of white education, from administration through the classroom level, is a prototype of the racially exclusive and biased conditions in the greater society, and must be changed.

Effect on White Attitudes

The damaging consequences of racially isolated classrooms and schools extend beyond the academic performance of black school children and the subsequent impairment of their ability to compete economically and occupationally with whites. Racial isolation in the schools fosters attitudes and behavior that perpetuate isolation in other important areas of life. Whites who attend racially isolated schools develop unrealistic self-concepts, hate, fear, suspicions, and other attitudes that alienate them from minorities. They tend to resist desegregation efforts in areas such as housing, employment, and schools. Highly trained black university graduates frequently are faced with the same barriers that affect the black high school dropout. Multiracialism is important, therefore, so that whites who attend suburban high schools and predominately white universities will not erect further barriers to minority university graduates, high school dropouts, or minority people who are victims of the welfare system.

Whites who have attended multiracial schools tend to seek racially mixed situations, have a greater probability of having black friends, appear more interested in having their children attend multiracial schools, and more frequently indicate that they would go out of their way to obtain housing in a multiracial neighborhood, than whites who attend racially isolated schools.

Multiracial schooling produces similar attitudes in blacks who express a greater willingness to reside in a multiracial neighborhood and to have their children attend multiracial schools.[9] For both races, behavior validating these attitudes has been observed. Blacks and whites who have attended multiracial schools more frequently have children who attend multiracial schools, live in multiracial neighborhoods, and have close white or black friends than those who have attended segregated schools.[10] However, the most important result is that non-discriminatory whites will not place barriers before minorities and inhibit their progress in all facets of American life.

The Goal of Multiracialism

The development of multiracial schools, a national policy and national law, is an American objective. But we cannot have a conflict-free multiracial society unless two prerequisites are met. Minority group people must have an equal opportunity to acquire skills that will enable them to compete successfully with members of the dominant group; attitudes that foster multiracial interactions must also be developed. The fulfillment of both these prerequisites can be greatly facilitated by the schools. Segregation has prevented either from being fully accomplished, and we are not optimistic about the future. The federal government has not yet assumed as active a role as it should in attempting to eliminate segregation. The President refuses to respond to the increasing segregation of large northern cities and restrictive housing practices in the suburbs.

We believe that a multiracial society is something more than an optimistic goal which the nation might move toward gradually over generations. The Kerner Commission warned in 1968 of the development of two societies, one white, one black. During the three intervening years we feel that divisions have increased. The situation is becoming critical, and social scientists, to respond effectively to this crisis, must abandon ivory tower neutrality. Colleges of education, for example, must begin to develop teacher training programs to prevent white youngsters from responding to people in racially motivated ways, and must retrain teachers for newly developed multiracial systems.

In speaking for the elimination of racially identifiable schools within the boundaries of the urban units, we do not blind ourselves to the fact that this is only the first step toward the eventual goal. This must be followed by cutting the white suburban noose that is strangling the cities. A multiracial school system is but one step toward elininating the inequities and creating a healthy society.

FOOTNOTES

1. *Berry v. School District of the City of Benton Harbor,* Civ. No. 9 (W. D. Mich., Oral Op. Feb. 17, 1971); *Northcross v. City of Memphis Board of Education* (W. D. Tenn. 1970); *Bradley v. Milliken,* Civ. Act. No. 35257 (E.D. Mich. June 16, 1971).
2. Robert W. Hooker, "Displacement of Black Teachers in the Eleven Southern States," Race Relations Information Center, Nashville, Tennessee (December 1970) p. 1.
3. Cf., for example, *Swann v. Charlotte-Mecklenburg Bd. of Education,* 91 S.Ct. 1267, 1277; *Hobson v. Hansen,* 269 F.Supp. 401 (D.D.C. 1967), and Order of May 25, 1971, ___ F.Supp. ___ (D.D.C.).
4. Robert J. Havighurst, "Education in Metropolitan Areas" (January 1967).
5. American Friends Service Committee; Delta Ministry of the National Council of Churches; Lawyers' Committee for Civil Rights Under Law; Lawyers Constitutional Defense Committee; NAACP Legal Defense and Educational Fund, Inc.; and Washington Research Project, *The Status of School Desegregation in the South, 1970,* p. 31.
6. See *Berry* [note 1].
7. Findlay, *et. al.,* "Ability Grouping: 1970," Report Prepared for HEW.
8. James McPartland, "The relative influence of school desegregation and of classroom desegregation on the academic achievement of ninth grade Negro children," Interim Report (September 1967).
9. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools,* Vol. 1 (1967).
10. Meyer Weinberg, "Desegregation research: An appraisal," *Phi Delta Kappan* (1968).

Chicano Education: In **Swann's** Way?

by Alan Exelrod

Although *Swann* and its companion cases address themselves to the desegregation of black and white schools in the South, they provide some basis for an attack on a whole range of educational practices in the Southwest, which could have a profound effect on the quality of Chicano education. This challenge would be based not on the use of the particular remedies prescribed by the Supreme Court, but on the decision's implication that the constitutional principle of racial equality is invested with new vigor and strength for brown as well as black. This article will first discuss the question of how *Swann* will affect the desegregation of Chicano school children, and then speculate on *Swann's* use as a constitutional basis for effecting curriculum and methodology changes in Chicano education.

I. Desegregation

Chicanos themselves are ambivalent about the desirability and value of an integrated education.[1] While there is a tendency today to think that Chicanos, wherever located, share the same educational goals, this is not the case. In rura areas and small urban centers, integration is sought because segregated education invariably means inferior facilities for Chicano schools, as well as psychological feelings of second-class citizenship. In large urban areas, such as Los Angeles (with 1.2 million Chicanos), Denver, and San Francisco, however, there is little desire for integration. The leaders of these "barrios'[2] resist education policies which undermine community control of schools and retard the enactment of bilingual/bicultural education. In the May 1971 Denver school board election, for example, the La Raza Unida Party (a militant Denver Mexican-American political action group) opposed busing despite a court order to integrate.[3] In San Francisco, shortly after *Swann* was announced, a federal district judge ordered the submission of desegregation plans on a black/white basis.[4] From conversations with leaders of the largely Chicano Mission District, it is apparent they do not want to be a part of that plan because the community is achieving a significant voice in its schools for the first time and fears a reduction in the existing bilingual/bicultural programs.[5] In analyzing *Swann*, therefore, it must be understood that many urban Chicano communities will abandon their neighborhood schools only if desegregation is accompanied by bilingualism and biculturalism.

Where the Mexican-American community does seek desegregation, *Swann* offers real benefits. Unlike the South, where segregation of blacks was accomplished by state legislative enactment, segregation of Chicanos in the Southwest (and the North where many Chicanos have migrated) has come about on a district basis by subtle, as well as blatant, means.*

Because one problem in Chicano desegregation suits is proving discriminatory actions, *Swann* helps by broadening the definition of segregation. The Court made specific reference to school site selection policies, recognizing that "choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system." Throughout the Southwest, school boards have built schools which serve single ethnic group neighborhoods, rather than fostering integration.[6] Often "colonias"[7] were built outside the city limits of towns in order to avoid building

*The proof and law to challenge the segregation of Chicanos is the same as that used in any Northern school segregation suit. [See Dimond article, p. 17]. Ironically, then, a suit challenging Chicano segregation in Texas, for example, will be a "Northern" school case in the "South." And there can no longer be any doubt that segregation of Chicanos, as with discrimination against any racial and ethnic group on the basis of national origin, is suspect and subject to close judicial scrutiny under the 14th amendment. See, e.g. *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Hernandez v. Texas*, 347 U.S. 475; *Cisneros v. Corpus Christi Independent School District,* 324 F. Supp. 599, 606 (S. D. Tex. 1970); *Alvarado v. El Paso Independent School District* (W. D. Tex. 1971), rev'd (5th Cir., June 16, 1971) (No. 71-1555): "This [is a] class action by 14 Mexican-American parents on behalf of themselves and children, and all other children and parents in the El Paso, Texas Independent School District. . . . In our view the complaint clearly states a cause of action."

codes and other city regulations.[8] The school district would build a school to serve the "colonia" and thereby insure that most Chicanos would attend primarily Chicano elementary schools. *Swann* holds that such a pattern of school construction constitutes "a factor of great weight" in identifying legally imposed school segregation. From the strong language in Chief Justice Burger's opinion, it is likely that proof of a discriminatory pattern in school construction would itself be enough to establish the maintenance of a dual school system and hence, a violation of equal protection.

The Court also broadened the definition of segregation by placing on the school district the burden of explaining one-race schools. "Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation." In other equal protection cases, application of the "close scrutiny" test requires the state to provide compelling reasons to justify its policies.[9] In the Chicano context it means that school districts must carry the burden of persuasion and explain why ethnically isolated schools exist within their district. Many Southwestern school districts will not be able to meet this burden.

Residential Segregation as Proof

The Chief Justice also implied in *Swann* that acts of governmental discrimination by persons other than school officials, which result in school segregation, would be relevant in proving the existence of a dual school system. Near the end of the decision he suggests that attempts by non-school governmental officials to "fix or alter demographic patterns to affect the racial composition of the schools" would require federal court intervention in school student assignment. The critical issue for the Chicano community is whether "other governmental action" includes discrimination in housing caused by state action.

Throughout the Southwest, attempts to procure public housing for Chicanos in middle-class areas have been stymied through various forms of governmental action. In Union City, California, a referendum changed a zoning ordinance to prevent the construction of low cost housing.[10] In San Antonio the City Council vetoed a public housing program it had earlier approved, which would have provided single family residences in middle-class neighborhoods primarily for poor Chicanos.[11] *Gautreaux v. Chicago Housing Authority*[12] reveals the federal government policy of constructing low cost housing in barrios and ghettos. These actions have resulted in segregated neighborhoods and, consequently, segregated schools. The Chief Justice's statement would be without significance unless it is interpreted to include these types of governmental practices. In proving a case of school segregation, data on housing discrimination, at least by state, would be relevant and should afford a basis for relief. The question of housing discrimination and residential patterns generally raises the issue of whether all school segregation is unconstitutional. Although Chicanos are more able to escape the barrio than blacks the ghetto, Chicanos continue to be concentrated in identifiable areas of cities.[13]

Unequal Resource Allocation

Even a holding that such school segregation is not "state-imposed" does not necessarily foreclose finding a 14th amendment violation and even requiring integration in many Southwestern communities. In *Keyes*, the Denver school case, the court found that such isolation in the schools was not state-imposed. But relying on differences in pupil achievement, per pupil expenditures, and teacher abilities, the court held that students in minority schools were not receiving an equal educational opportunity. Evidence was presented that integration was necessary to end the denial of equal educational opportunity, and an order was entered employing the equitable remedies outlined by *Swann*. Although the 10th circuit reversed that part of the remedy, the possibility of such remedy will remain until other circuits and finally the Supreme Court speak. Whether Chicanos want the remedy of integration for such denials will depend on the circumstances of each particular community.

Although the issues discussed in the previous paragraphs apply to future litigation, the courts are faced with the immediate remedial problem of what the contents of a desegregation plan should be when more than one minority is involved. In many Southwestern cities there are significant

Alan Exelrod, a staff attorney with the Mexican American Legal Defense and Educational Fund, has litigated Chicano school problems throughout the Southwest.

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numbers of blacks, Chicanos, and in some places, Asians. One important question is whether placing Chicanos and blacks into schools without Anglos serves to create a unitary school district. Another is the extent to which a desegregation plan must take account of the differing educational needs of non-English speaking children.

Does Black + Brown = Integration?

The Houston Independent School District is currently facing the first problem in a fourteen year old desegregation suit, *Ross v. Eckels.*[14] At no time during the suit have Chicanos (whose barrios adjoin the black ghetto) been recognized as a separate, identifiable group even though they comprise fifteen percent of the school population, their native language is Spanish, and they have been racially isolated. Because Chicanos have been considered white throughout the litigation, the pairing of "black" and "white" schools means in practice that the two minorities will be desegregated with each other. Recently, an attempt by Chicano plaintiffs to intervene was denied. This denial seems clearly wrong. The placing of two historically identifiable, disadvantaged groups together cannot satisfy equal protection. The purposes of desegregation are to improve minority schools, eliminate the psychological stigma attached to segregation, and remove the vestiges of the dominant Anglo's containment of minority children in separate schools. The continuation of minority black and brown schools does not serve these purposes. In *Alvarado v. El Paso Independent School District,* the Fifth Circuit, by holding that Chicanos were a recognizable minority for the 14th amendment discrimination and segregation claims, concurred in this view. *Cisneros v. Corpus Christi Independent School District* held, similarly, that "Mexican-American students are an identifiable ethnic minority class sufficient to bring them within the protection of *Brown*," and "placing Negroes and Mexican-Americans in the same school does not achieve a unitary system as contemplated by law." [Cites in note, p. 25]. And even more recently, an Austin, Texas district court, while finding no de jure segregation of Chicanos, ordered the parties to submit a tri-ethnic integration plan: "There will be little educational value in a plan which merely integrates one socially and economically disadvantaged group, the blacks, with another, the Mexican-Americans."[15]

Preserving Cultural Identity

San Francisco Unified School District is currently facing the second problem, preserving cultural identity in integrated schools. In San Francisco, the district court was only presented evidence of the racial isolation of blacks, although all desegregation plans took into account the city's multiethnicity. The danger is that the Chicano and Chinese minorities will be so dispersed they will lose or fail to receive needed educational programs. The solution is to view identifiable minority groups—black, brown, yellow and red—as separate and distinct classes for purposes of equal protection analysis and equitable relief.

Integration should be accompanied by curriculum modifications, teacher re-training and other programs which recognize the particular educational needs of these minority groups. If courts find that Chicanos do not comprise a large enough percentage of the school district population to warrant district-wide substantive educational program changes, integration plans should contain schools with large enough proportions of Chicanos to justify special programs which meet Chicano educational needs. This solution recognizes that integration is but one aspect of equal educational opportunity. In multiethnic communities, flexibility is necessary to insure that the rights of all minorities are protected.

In sum, *Swann* offers the Chicano new means of proving discrimination and, of course, powerful remedies to correct it. Because many communities are often multiracial and multiethnic, *Swann* creates new challenges to the courts to insure that desegregation takes into account the needs of all groups.

II. Equal Educational Opportunity

> Our past methods of educating children suffering linguistic handicaps in English have clearly been ineffective. The chief reasons for this seem to be that we have not taken advantage of the child's best instrument of learning—his mother tongue—and that we have failed to create in him a sense of dignity and confidence. In a word, we have not put first things first: We have thought it more important from the outset to teach the non-English speaking child English rather than to educate him. We have in short been more interested in assimilating than educating.[16]

Swann offers Chicanos an opportunity to correct this situation through the constitutional principle of "equality of educational opportunity." No one expected this principle to die a sudden death in the *Swann* group of desegregation cases, but weak opinions would certainly have minimized judicial scrutiny of the "undereducation" that is taking place in Southwestern schools.

The optimism about "equal educational opportunity" stemming from *Swann* rests on four bases: the specific references to *Brown v. Board of Education* in the opinion; the court's remarks requiring equality of facilities; the powerful remedies given to federal courts to correct desegregation; and the statement in the final paragraphs of the opinion that the federal court's task was only completed whwhen "the affirmative duty to desegregate has been accomplished and *racial discrimination through official action is eliminated from the [school] system.*"

Equal educational opportunity for Chicanos means the implementation of programs compatible with their language and cultural needs. Often this will mean bilingual/bicultural education. Many persons have a misconception of bilingual education, and confuse English as a Second Language (ESL) programs with it. ESL is designed solely to teach English to non-English speaking children and is not meant to preserve a culture, improve knowledge of the mother tongue, or help English-speaking students to learn the community's other language. True bilingual education includes all these goals. As the Draft Guidelines for the Bilingual Education Program state: "Bilingual education is instruction in two languages and the use of those two languages as mediums of instruction for any part of or all of the curriculum. Study of the history and culture associated with a student's mother tongue is considered an integral part of bilingual education.[17] With this definition in mind, the question is, what legal theory will support it?

Second Class Schooling

The Chicano child brings to the school a different culture and language than that of the Anglo. When he comes to the school he is often forbidden to speak his native language and his cultural traditions are ignored. Often the school he attends is inferior to the school just down the road attended primarily by Anglos. He sees few Chicano teachers and fewer Chicano administrators. His academic life is tainted with the prejudice and the indifference of Anglo teachers who see litt. prospect for his academic success. He sees his brothers and sisters shunted into mentally retarded classes even though these same siblings care for the whole family when the parents are working. The end result is alienation from school, and eventual dropping out, a process completed in the Chicano's early teens. The high dropout rate reflects the psychological damage done to the child by the school.

Agenda for Change

The Chicano child requires a program compatible with his needs and experiences. Research suggests that a method of instruction combining Spanish and English is the best way to teach Chicanos while preserving essential parts of their culture. [18] The curriculum should contain Chicano contributions to history, art, and literature. None of this can be accomplished without a teaching staff that is sympathetic to a multiethnic approach. The goal of this agenda for change is to develop Chicano students able to recognize their own worth and to succeed in school.[19] Many Chicano leaders, especially in urban areas with large barrios,advocate Chicano community control of identifiably Chicano schools as the most politically feasible and best way to effect the needed change.

The Law in Brief

Translated into legal terms, the Fourteenth Amendment argument proceeds as follows. Presently the schools are treating the Anglo and the Chicano children identically. The method of instruction and the curriculum are not geared to satisfy Chicano needs. Achievement test results, dropout rates, the large percentage of Chicanos in classes for the mentally retarded, the lack of Chicano teachers and administrators, all point to this fact. The schools are attempting to change Chicano children rather than accepting the fact that Chicanos bring to school a different background than Anglos. This sameness of treatment between intrinsically different groups, to the educational detriment of one, cannot be justified. It can satisfy neither the compelling interest test nor the rational relationship test used to determine violations of equal protection.

This article is too brief to include a thorough analysis of the applicable case law. Much of what has been said goes beyond what any court has

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ordered. However, there is precedent for judicial analysis of methodology and curriculum in *Hobson v. Hansen,*[20] *Keyes,* and for compensatory education, *United States v. Jefferson County Board of Education.*[21] In addition, the HEW Office of Civil Rights has issued a Memorandum regulation which requires school districts to make provisions to insure that non-English speaking children participate fully in the school program. Currently, new regulations are being discussed that will state in detail the obligations of school districts in regard to bilingualism.

Needless to say, many issues are not considered in this article: To what extent must Anglos participate in a bilingual program? Does the constitutional right to a bilingual program depend on the strength with which the Chicano community in a particular school district has held onto their language and culture? Are there manageable judicial standards which can be developed to govern this problem?

Bilingual/bicultural education is a reality in several school districts in this country– Edgewood Independent in San Antonio, United Consolidated outside of Laredo, and Dade County, Florida.[22] Some of these districts have seen bilingual education as their obligation and pay for it out of local revenue sources. Most, however, rely on money from the Bilingual Education Act [20 U.S.C. §880], which supplies funds only for pilot programs. A constitutional requirement of bilingual education will require that local school districts share with the federal government responsibility for the development and implementation of schools for all our children.

This article has attempted to highlight some of the educational problems facing Chicanos in the Southwest. In the final analysis, the problem centers around both a valid constitutional definition of equal educational opportunity and reform of the schools. Desegregation, clearly, is an important aspect of equal educational opportunity. But for the Chicano, because of his unique educational background, linguistically and culturally, it is not the only solution. For the Chicano, desegregation is the superstructure of the building of the principle of equal educational opportunity; bilingualism is its foundation.

FOOTNOTES

1. These observations are based on several years experience litigating educational problems for various Chicano communities throughout the Southwest.
2. Spanish noun meaning "neighborhood" or "ghetto."
3. *Keyes v. School District Number One,* 313 F. Supp. 90 (D. Colo. 1970), aff'd in part, rev'd in part, ___ F. 2d___ (10th Cir. 1971). The district court recognized that Chicanos opposed extensive moving of children to achieve integration.
4. *Johnson v. San Francisco Unified School District,* No., C-70-1331 SAW (N. D. Cal. 1970).
5. The Superintendent of Schools proposed a cutback for these programs after a court order was entered. This reaction, of course, is not necessarily a response to desegregation and need not be a part of any desegregation plan. Nor do many "neighborhood" schools provide Chicanos either a voice or a bicultural and bilingual education.
6. See *Cisneros v. Corpus Christi Independent School District,* 324 F. Supp. 599 (S. D. Tex. 1970); *Perez v. Sonora Independent School District,* No. CA 6-224 (N.D. Tex. 1970); *Keyes v. School District Number One, Denver, Colorado,* 313 F. Supp. 61, 69 (D. Colo. 1970).
7. Spanish noun meaning a housing subdivision generally in the outskirts of town.
8. See generally Grebler, Moore, & Guzman, *The Mexican American People,* p. 273 (The Free Press, N.Y.).
9. *E.g., Harper v. Virginia State Bd. Of Elections,* 383 U. S. 663, 670 (1966); *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 628 (1969).
10. *SASSO v. City of Union City,* 424 F. 2d 291 (9th Cir. 1970). After protracted litigation, the suit was finally settled and some low cost housing constructed.
11. San Antonio Evening News, Oct. 9, 1969, p. 1.
12. 296 F. Supp. 907 (N.D. Ill. 1969).
13. See *e.g., Grebler, et al.,* note 8, p. 271 *et. seq.* Although *Swann* in conclusion suggests that a district need be "unitary" at only one point in time, the Court's discussion of school construction suggests that close judicial scrutiny of all school segregation will continue to determine whether it is "state-imposed." [See Dimond Article, p. 17].
14. The most recent decision is reported at 434 F. 2d 1140 (5th Cir. 1970).
15. *U.S. v. Texas Education Agency,* No. A-70-CA-80, Memo. Opinion and Order (W. D. Tex. June 20, 1971).
16. Anderson and Boyer, *Bilingual Schooling in the United States,* Vol. I, p. 147, Southwest Educational Development Laboratory, Austin, Texas (1970) (available through U.S. Gov't. Printing Office).
17. Draft Guidelines for the Bilingual Education Program under the Bilingual Educational Act.
18. H.J. Johnson and W. Hernandez, *Educating the Mexican American,* Judson Press (1970).
19. Sanchez, "History, Culture and Education," in *La Raza-Forgotten Americans* (1966).
20. 269 F. Supp. 401 (D. D. C. 1967), aff'd sub nom. *Smuck v. Hansen,* 408 F. 2d 836 (5th Cir. 1966).
21. 372 F. 2d 836 (5th Cir. 1966) But cf. *McInnis v. Shapiro,* 293 F. Supp. 327, aff'd sub nom., *McInnis v. Ogilvie,* 394 U.S. 322 (1969). See also, Comment, 49 Tex. L. R. 337 (1971).
22. Massachusetts is considering a statute which would mandate bilingual programs for school districts which have 20 or more students whose native language is not English. Copies of this bilingual education statute are available at the center for Law and Education.

NOTES AND COMMENTARY

This section of Inequality in Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

SPECIAL EDUCATION

LOSE A BATTLE, WIN THE WAR: BOSTON RETARDED CHILDREN WIN HEARING RIGHT BEFORE EXCLUSION FROM SPECIAL CLASSES

Flaherty v. Connors, 319 F. Supp. 1284 (D. Mass. 1970).

In this suit, a retarded child sought a temporary injunction ordering his readmission to a special school, and a permanent injunction on behalf of all other retarded children similarly excluded from school. The District Court ruled that the case presented an individual complaint and could not be prosecuted as a class action; intimated that the plaintiff had failed to exhaust his state administrative remedies; found that he had not profited from two years attendance in the special school, because he had become progressively more disruptive over that period; and found that there had been no showing of irreparable harm. Accordingly, it denied the application for a preliminary injunction.

The nub of the complaint, however, was a denial of due process: plaintiff's suspension from school without an adequate hearing. The District Court suggested that the plaintiff had waived the hearing offered by the defendant Boston school authorities, but that he was free to follow the hearing procedure provided by Massachusetts law and regulations of the Boston School Committee.

Negotiations to provide the plaintiff a satisfactory school program, and to promulgate satisfactory hearing procedures, continued until June 21, 1971, when the plaintiff agreed to a dismissal of his law suit for two reasons:

- Plaintiff enrolled in a satisfactory school program, and was accorded a full hearing before the Assistant Superintendent; and
- The Boston School Committee promulgated a regulation affording students and their parents the right to a hearing prior to exclusion from special classes. The hearing includes the right to notice, to call witnesses, to cross-examine witnesses, and to appear with counsel.

The plaintiff is represented by Michael Altman of the Boston Legal Assistance Project, 474 Blue Hill Avenue, Roxbury, Massachusetts 02121.

THREE JUDGE COURT APPROVES FULL HEARING BEFORE CHANGE IN MENTAL RETARDATION EDUCATIONAL STATUS

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, Civ. No. 71-42, (E. D. Pa. June 18, 1971).

This complaint on behalf of all Pennsylvania mentally retarded children attempts to secure (1) a full hearing before exclusion from school or assignment to special education, (2) mentally retarded children's right to some publicly supported education, and (3) compensatory education for the period of wrongful exclusion of any mentally retarded child from any educational opportunity. Because a vindication of these rights would require that several state-wide statutes be declared unconstitutional, the convening of a three-judge court was necessary.

District Judge Masterson found that the questions raised by the complaint were not insubstantial and convened a three-judge court. Pursuant to stipulation of the parties, the three-judge court approved and ordered a detailed plan which insured that no Pennsylvania child aged 5½ to 21, who is thought to be mentally retarded by any school official or the parent, would be subjected to a change in educational status (or denied any educational assignment) before being afforded notice and the opportunity for a full due process hearing at which the local school district, not the parent, shall bear the burden of proof.

Trial before the three-judge court on all other issues raised by the complaint will proceed in August. Copies of the plan are available from the Center for Law and Education. Plaintiffs are represented by Thomas Gilhool, Room 1300, 1 N. 13th Street, Philadelphia, Pennsylvania, and Paul Dimond of the Center for Law and Education.

STUDENT RIGHTS

NINTH CIRCUIT UPHOLDS LIMITS ON STUDENT HAIR (WHILE BERKELEY POLICE LET THEIRS GROW WILD)

King v. Saddleback Junior College District, No. 26,452; *Olff v. East Side Union High School District,* No. 25,132,__F. 2d__(9th Cir. June 25, 1971).

The same week that the Berkeley City Council voted to allow policemen to wear long hair and beards, the United States Court of Appeals for the Ninth Circuit upheld the legality of student dress codes in two nearby California cities which deny students the same choice. This ruling overturned two lower federal court decisions which had prevented the enforcement of the regulations.

Although finding that "in neither case was there any evidence that length of hair led to any disruption among students," Circuit Judge Trask defined the issue as being "the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate . . .without unconstitutionally infringing upon the rights of those who must live under it." The court found no infringement upon first amendment freedoms analogous to the Supreme Court's finding in *Tinker v. Des Moines Community School District,* 393 U.S. 503 (1969); nor, distinguishing *Griswold v. Connecticut,* 381 U.S. 479 (1965), as a "marital privacy" case, any invasion of the "right to be left alone;" nor a denial of equal protection; nor, because the codes were part of the "regulations necessary for the day to day operation of schools, classes, and the general educational processes," any denial of due process.

Relying on affidavits by school officials, and upon their "professional experience that extreme hair lengths of male students interferes with the educational process," the court concluded: "We are satisfied that the school authorities have acted with consideration for the rights and feeling of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools. *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)."

Contrary decisions include: *Crews v. Cloncs,* 432 F. 2d 1259 (7th Cir. 1970); *Griffin v. Tatum,* 425 F. 2d 201 (5th Cir. 1970) (partially invalid); *Richards v. Thurston,* 424 F. 2d 1281 (1st Cir. 1970); *Breen v. Kahl,* 419 F. 2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); and *Crossen v. Fatsi,* 309 F. Supp. 114 (D. Conn. 1970), (unconstitutionally vague).

DRUGS

N.W.R.O. ASKS F.D.A. TO EXAMINE RITALIN

N.W.R.O. has petitioned the F.D.A. to reconsider and repeal its rulings approving Ritalin as safe and effective for use in the treatment of "minimal brain dysfunction" ("hyperkinetic behavior disorders"). The petition charges that Ritalin is misbranded and, on the basis of new evidence of its potential for abuse and its possible linkage to a blood vessel disorder, unsafe.

The petition describes (1) the extreme difficulty of accurately defining and diagnosing "hyperactivity;" (2) the likelihood that environmental deprivations create similar symptoms whose appropriate treatment does not include drugs; (3) the potential for dependence and adverse side effects from long-term use; (4) the mushrooming and inappropriate use of Ritalin, pressured by school officials looking for a quick cure for their own shortcomings and accommodated by doctors too quick to diagnose and prescribe; (5) the false, misleading and over-broad advertising of Ritalin by its manufacturer; and (6) given such circumstances, the inevitable failure to regulate Ritalin's use to enable parents and doctors to make informed choices to use the drug

appropriately and safely. The attack is broad and seeks to eliminate all use of Ritalin on children with "minimal brain disorder" or "hyperkinesis" (or whatever other label is placed on the ill-defined "syndrome"). The only exception would be for investigational use under strict controls similar to those applied to methadone maintenance programs.

The attack raises issues which are important and subject to a variety of views. [See *Inequality in Education,* Number Eight]. Hopefully, N.W.R.O.'s petition will permit a thorough and enlightened review of "hyperactivity" in school children and amphetamine treatment for it.

N.W.R.O. is represented by The National Legal Program on Health Problems of the Poor, 2477 Law Building, University of California, 405 Hilgard Avenue, Los Angeles, California, 90024.

TITLE I

TITLE I CLOTHING GRANTS FOUND TO IMPROVE STUDENT SELF-IMAGE AND SCHOOL ATTENDANCE

For some time proponents of the use of Title I money for clothing have been saying that sufficient quantities improve children's self-image and school attendance. This assertion is beginning to receive substantiation.

Last year, responding to the demands of the Rhode Island Fair Welfare Rights Organization (NWRO), Title I officials in Providence instituted a $96,000 Supplementary Clothing Grant (SCG) program. Providence is one of the first school districts in the country to use substantial amounts of Title I money for clothing. A recent study evaluating the results of the program give evidence that it is indeed fulfilling its objectives of improving children's self-image.

A study of the Providence Clothing Grant Program, conducted by members of the Brown University Sociology Department in cooperation with Title I parents, explored the attitudes of children and parents receiving the clothing grants under the Providence Title I program. The Brown sociologists reported that 96% of the children felt that poorly-dressed children feel differently about going to school than well-dressed children ("inferior," "made fun of," or "left out"), and 88% felt that poorly-dressed children were treated differently by other children. A smaller percentage (63%) felt that teachers treated them differently because they were poorly-dressed, but 72% said that poorly-dressed children were likely to make lower grades than well-dressed children. The Brown study also reported that an overwhelming majority of children (84%) sometimes felt like not going to school because their clothes were poor, and 74% have actually stayed home for this reason.

The Brown study also found that parents' perceptions were similar to their children's. 78% of the parents felt that poorly-dressed children were treated differently by other children, and all felt that teachers treated poorly-dressed students differently. (Some parents also felt that a few teachers gave special attention to poorer children.) 70% of the parents reported that their children were sometimes reluctant to attend school or take part in school activities because of poor clothing. Although agreeing that clothing grants were helpful, all felt that the $48.00 per child allowance needed to be increased substantially "so that a greater positive effect on the children might be made." The Brown study concludes that Title I clothing grants should be continued, but with an increased allowance.

Preliminary results of another study of the relationship between a clothing program and absences have been released. The results show that recipients of clothing grants reduced their absences, compared to a matched control group which did not receive grants. Because some recipients also received other Title I services, some of which were designed to improve attendance, the contribution of clothing grants to absence reduction cannot be separated from the contribution of other Title I programs. *Inequality In Education* expects to publish complete findings of this study when the final report is released.

These studies should be useful evidence for other lawyers and community groups seeking clothing grants out of Title I funds. What was once an unverified assertion has become accepted as fact in Providence – and the superintendent of schools has agreed with Rhode Island Fair Welfare to extend the Title I Supplementary Clothing Grant Program for another year.

Bob Cohen

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